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AND BY THE
CHIEF JUDGE IN BANKRUPTCY
AND BY THE
COURT OF APPEAL
ON APPEAL FROM THE CHANCERY DIVISION AND THE
CHIEF JUDGE
AND IN
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OF THE

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AND BY THE

CHIEF JUDGE IN BANKRUPTCY

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE CHANCERY DIVISION AND THE CHIEF JUDGE

AND IN

LUNACY.

GATHERCOLE *v.* SMITH.

[1879 G. 174.]

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1880
M. R.
June 15.
C. A.
1881
March 1.

16 B.D. 625

Incumbents' Resignation Act, 1871 (34 & 35 *Vict. c.* 44), s. 10—*Retired Clerk—Pension—Debt due by retired Clerk to Incumbent—Set-off.*

By the 10th section of the *Incumbents' Resignation Act*, 1871, the pension allowed to a retiring clerk is made a charge upon the revenues of the benefice, "and shall be recoverable as a debt at law or in equity from the incumbent of the said benefice by the retired clerk, his executors, administrators, and assigns, . . . but shall not be transferable at law or in equity."

In an action by a retired clerk against the incumbent of the benefice for payment of the arrears of the pension that had been allowed him under the Act :—

Held, that the incumbent could not set off against such arrears a judgment debt previously due to him from the retired clerk.

THIS was an appeal from the decision of *Jessel*, M.R.

The Plaintiff was a clerk in holy orders, and was, until the 6th of March, 1877, the incumbent of the vicarage of *Chatteris*, in the *Isle of Ely*, in the county of *Cambridge*, and by a declaration made on the 5th of February, 1877, by and under the hand of the Bishop of *Ely*, under the provisions of the *Incumbents' Resignation Act*, 1871, it was declared that the said benefice should be void of the person of the Plaintiff to all intents and purposes of the law on and after the 6th of March, 1877, subject, nevertheless, to the payment, by half yearly payments from the 6th day of March, 1877, out of the revenues thereof, of the yearly pension of £450.

The Defendant was also a clerk in holy orders, and had since the 6th of March been the incumbent of the said vicarage of *Chatteris*.

In March, 1879, three half-yearly payments of the pension being in arrear, the Plaintiff brought this action, claiming payment of the same out of the revenues of the said vicarage by the Defendant.

The Defendant, by his defence, did not admit the claim, and by his counter-claim alleged that by an indenture of mortgage dated the 8th of August, 1845, and made between the Plaintiff of the one part, and one *W. Hawkins* of the other part, the Plaintiff granted the advowson of the parish church of *Chatteris* aforesaid to *W. Hawkins* in fee, subject to redemption, on payment by the Plaintiff to the said *W. Hawkins*, his executors, administrators, or assigns, of the sum of £24,500, with interest thereon; that on the same 8th of August, 1845, the Plaintiff executed a warrant of attorney to confess judgment for the same sum of £24,500 in favour of the said *W. Hawkins;* that on the 23rd of August, 1845, the said *W. Hawkins* signed judgment in the Court of Queen's Bench for the said mortgage debt and interest and costs; and that after divers mesne assignments, ultimately by an indenture dated the 19th of December, 1873, the said judgment debt was assigned and became absolutely vested in the Defendant, and was still owing to him; and the Defendant claimed to set off such judgment debt against the arrears of pension claimed by the Plaintiff.

There was a reply and a rejoinder and surrejoinder, but the matters therein contained did not materially alter the main question now before the Court. On the 20th of April, 1880, issue was joined, and on the 15th of June, 1880, the action came on for trial.

It was in evidence that, on the 18th of September, 1877, the Defendant had brought an action against the Plaintiff in the Common Pleas Division of the High Court upon the judgment debt, which was tried before Lord *Coleridge*, C.J., without a jury. On that occasion it was alleged that the judgment debt had merged or was satisfied, but Lord *Coleridge* held that it was not so, and ordered a reference to ascertain the amount still remaining due under the judgment.

Chitty, Q.C., and *W. W. Cooper*, for the Plaintiff.

Ince, Q.C., *Bompas*, Q.C., and *Smart*, for the Defendant.

JESSEL, M.R.:—

The simple question which I have to decide is this: The *Incumbents' Resignation Act*, 1871, says (sect. 10) that the pension to a retiring incumbent of a benefice shall be a charge upon the revenues of the benefice, and shall be recoverable as a debt from the existing incumbent. The incumbent says: "The pensioner owes me money in equity on a judgment, therefore I am not bound to pay." To my mind that is no answer at all, because the Act does not make the pension the debt of the incumbent: it makes it a charge upon the income which the incumbent receives. Though the Act says that the pension shall be recoverable as a debt, it does not make it a debt: it simply provides a mode of compelling the incumbent to pay over the amount of the pension out of the revenues. Under the 9th section it is plain that the pension is payable out of the revenues of the living, and the reason of it is equally plain, inasmuch as an incumbent who receives the income of a living is not liable to have a receiver appointed as a general rule, because under a receivership divine service is not provided for; whereas, when there is a sequestration, it is. It is much more convenient to make him pay directly, than by issuing a sequestration over the living, which leads to difficulty and complication in the intervention of the bishop, and so on. The Act provides an easy mode of recovering the amount,

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but does not make it actually a debt, but only recoverable as a debt.

Then the 10th section goes on to say that "such pension shall not be transferable at law or in equity." What does that mean? Why, obviously, that it is to be an inalienable provision. I am at a loss to imagine what meaning can be given to it except that. I do not see an answer to the question—what does the section mean?—if it does not make the pension an inalienable provision. Why should the Act make it not transferable except with that view? I think a Judge is bound, when he has a specific section of this kind before him, to suppose that there was some purpose for which it was put in, and some rational object to be served. What is a rational object of the section? The Legislature perhaps considered it indecent that aged and infirm clergymen should go about the country reduced to a state of beggary, or lodged in a workhouse; and therefore they intended to make the pension an inalienable provision; but why they should make it not transferable except with that view, I am at a loss to understand; nor has any other reason been suggested at the Bar. Whatever the words may import, I think that is the plain meaning of them, and that the object of the Act of Parliament was to provide such an inalienable provision. If that is so, there is an end to the whole case as to set-off; because if it is an inalienable provision you cannot set off an antecedent obligation as against an accruing payment. That disposes of that part of the case.

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As regards the next part of the case, there is a counter-claim upon the judgment. No doubt you can bring a fresh action upon a judgment, and the Defendant has done so, and has got a judgment in the fresh action in the Common Pleas Division. Is it to be supposed that he can bring forward another claim on the same judgment by way of counter-claim? I have no hesitation in saying that if he brought a separate action I should stop it upon summons as being frivolous and vexatious; and if it could not be maintained as a separate action it cannot be maintained as a counter-claim. The suggestion theoretically amounts to this, that a man might bring an action for the same amount in every Division of the High Court; that is, he might bring as many actions as there are divisions of the Court. Is it to be supposed

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that a man might bring, say, eight or nine actions, and seek to recover the same amount in each, and that the Judges in the different divisions could not stay or dismiss the other actions? Why of course they could; and they would stay them on this ground, simply as being vexatious and frivolous. I have no doubt that in this case the Defendant's object is "set-off." He would never have done so vexatious a thing as to bring an action in this Division pending the decision of the referee appointed in the Common Law Division action. Therefore, I have no hesitation in saying that the Plaintiff is entitled to what he asks, and that the counter-claim ought to be dismissed with costs; and I should have had no doubt at all excepting for this, that Lord *Coleridge* is said to have come to a different conclusion, though I do not know for certain that he has done so, for I have no report of the judgment before me that I can refer to in order to see what he did decide, or how he arrived at the conclusion at which he is said to have arrived.

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The Defendant appealed. An appeal was also lodged by the Defendant in the action in the Common Pleas Division against the judgment of Lord *Coleridge*, the hearing of which appeal stood over to abide the result of the present appeal, which was heard on the 1st of March, 1881. (1)

Ince, Q.C., *Bompas*, Q.C., and *Smart*, for the Appellant:—

The question is whether the pension allowed to a retiring clerk under the *Incumbents' Resignation Act*, 1871, is capable of being set off, after it has accrued due, against a debt due from the retired clerk to the incumbent. We admit the pension is not assignable before it accrues due, and in that respect the case is analogous to those in which the half-pay of officers and pensions of public servants have been held to be not assignable: *Flarty* v. *Odlum* (1); *Lidderdale* v. *Duke of Montrose* (2); *Wells* v. *Foster* (3); *Stone* v. *Lidderdale* (4); and in *Hawkins* v. *Gathercole* (5) it was held that this judgment debt was not a charge on the benefice in

(1) 3 T. R. 681.
(2) 4 T. R. 248.
(3) 8 M. & W. 149.
(4) 2 Anstr. 531.
(5) 6 D. M & G. 1. 1 Jur N.S. 481

(1) For judgment see 7 Q B D. 626: the judgment of Ld Coleridge was reversed

question. But in *Flarty* v. *Odlum* (1), which was a case of the half-pay of an officer, Mr. Justice *Buller* said, "If the question had been whether or not the pay which was actually due might be assigned, I should have thought it, like any other existing debt, assignable." That *dictum* is directly in our favour, for here we seek to set off our debt against arrears of the pension. We submit that when the pension becomes payable it is a debt recoverable from the incumbent and as such assignable, and after it is assignable it can be taken in execution to satisfy a judgment debt, and therefore it can be set off against a debt due from the retired clerk to the incumbent.

[JAMES, L.J.:—The 10th section of the Act says that the pension is recoverable by the retired clerk, his executors, administrators, or assigns, but shall not be transferable at law or in equity. How can there be an "assign" when it is not transferable?]

The Court must give some meaning to the word "assign," if it can. We submit the construction of the section is that the pension shall not be transferable until it becomes due.

[JAMES, L.J.:—The section says that the pension is payable out of the revenues of the benefice. Therefore it is a charge on the revenues. It is not a personal debt.]

But here the retired clerk has chosen to bring an action for it as a debt. We submit that the Defendant being the hand to pay the arrears, and also the hand to receive the judgment debt, is entitled, so soon as he is sued for the arrears, to set off the judgment debt due to him.

Chitty, Q.C., and *W. W. Cooper*, for the Respondent, were not called upon.

JAMES, L.J.:—

It does not appear to me that there is really any difference of opinion between Lord *Coleridge* and the Master of the Rolls. From the report which we have seen—which seems to be a very insufficient and fragmentary report of what took place before Lord *Coleridge*—it does not appear that this point which the

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(1) 3 T. R. 681.

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14 B D 68

14 B D 6

Master of the Rolls has taken—the construction of this particular Act enabling clerks to resign—was really submitted to him, but it all turned apparently on the question of the construction of the mortgage deed—whether the deed was still existing or not—and I am of opinion that not only is there no sufficient ground for dissenting from the view which the Master of the Rolls has taken of the Act of Parliament, but I think he is right in his construction of it. What I am principally influenced by is the very strong words used in the Act. It does not say "shall not be assigned," but it says "shall not be transferable." Now "transfer" is one of the widest terms that can be used. It appears to me that very word was used by the Legislature not only to prevent the incumbent from assigning himself, but for preventing any transfer by operation of law *in invitum*—not only to prevent a voluntary dealing by an incumbent with an annuity, but to prevent the annuity vesting in a trustee in bankruptcy, or being seized or attached under a garnishee order by an execution creditor, or otherwise transferred. If the right was not to be transferred in that way, it cannot make any difference in substance, that the person who seeks to say that he has got the right to it now, is the person who has to pay the money. That seems to me to be a mere accident, which does not interfere with the substance of the matter; and it must be treated as if somebody else had got this judgment, or as if the debt had been assigned to somebody else, and he was seeking to enforce a garnishee order against the present incumbent to restrain payment to the old incumbent. That would be entirely inconsistent with the object of the Act, which was, as the Master of the Rolls put it, to provide for the maintenance of a clergyman. He is only allowed to withdraw from his incumbency with the consent of the bishop, and subject to such control as to the bishop or the patron may seem right, by reason of his infirmity, of age, or otherwise. One sees why that provision was put in. Provision is made so that an aged clergyman resigning, and in many instances receiving a very small sum, as is the case in nine-tenths of the cases in this country, should have the entire allowance during the continuance of his infirmity, and not be driven to live in the workhouse, which would not be a very creditable result of such a section of the Act of Parliament. That

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is what it was intended to be. If we were to allow this thing to be done it would be to violate the very words of the Act of Parliament, and to say that the provision so made, or intended to be made, for the maintenance of this gentleman was transferred by operation of law and by the operation of a prior judgment to the prior judgment creditor. I am of opinion that the Master of the Rolls is right in the view which he has taken, and that we cannot sanction such a transfer.

Cotton, L.J.:—

I think in this case that there really is no conflict between the Master of the Rolls and Lord *Coleridge*, for if the point had been in any way decided by Lord *Coleridge*, I have no doubt that the effect of it, at least, would have appeared in that report, imperfect though it be, of his judgment. The simple question is, whether the Master of the Rolls' decision is right. In my opinion it is. There is some difficulty, in consequence of the wording of the 10th section of the Act of Parliament, for it does say that this pension is to be recoverable by the retired clerk, his executors, administrators, or *assigns*. But then there follow words which are clear and unambiguous: "But such pension shall not be transferable at law or in equity." Now, if that word "assigns" is necessarily inconsistent with the clear words that follow, my opinion is that we ought to disregard it, although of course the general rule is that you must, if possible, give effect to every word. There may be some possible meaning to be given to that word "assigns," but it must be a meaning consistent with the words that follow: "But such pension shall not be transferable at law or in equity." In my opinion the effect of that is this: that while it is a pension,—that is to say, while it remains a charge on the benefice, or while it remains suable for as a debt from the incumbent, it is that which the late incumbent cannot by any act of his own transfer to another. So, in my opinion, it cannot be transferred to another by operation of law in consequence of that other person having got a judgment or other process of law, by which, if it were the absolute property of the debtor without any Parliamentary fetter, the creditor could make himself master of the fund, and say, "I am entitled to receive it." That being so, in my opinion this Defendant is not

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entitled in his counter-claim to defend himself by saying, "I have a claim against you, by means of which I am entitled to have a judgment to defeat that which, under the Act of Parliament, you have a right to, without any power on your part to transfer the right to receive it to any other person." In my opinion, therefore, the decision of the Master of the Rolls must be upheld.

JGBD

LUSH, L.J.:—

I am of the same opinion. The Act allows an incumbent, for the first time, if he be incapacitated by permanent mental or bodily infirmity from the due performance of his duties, if he has held the incumbency for a certain number of years, to retire from it with the consent of the bishop or patron, and, if the patron refuses his consent, with the consent of the archbishop, and to have a certain allowance out of the revenues of the living. The object, therefore, is that clergymen should not be obliged, as they were before that Act, to continue in a living when they were incapacitated from the performance of the duties of it, but should be at liberty to retire and have a maintenance for themselves out of the revenues when the new parson is put in office. Then comes the 10th section, which says that "the pension so allowed shall be a charge upon the revenues of the benefice, and shall be recoverable as a debt at law or in equity from the incumbent of the said benefice, by the retired clerk, his executors, administrators, or assigns, but such pension shall not be transferable at law or in equity." Now that clearly suggests to my mind the intention of the Legislature that neither should he be capable of assigning it over and depriving himself of the pension, nor should it be taken from him by any Act or by operation of law; that he should not be able to do it directly by assignment nor indirectly by consenting to a judgment which would override it and become a permanent charge on it, so as to deprive him of the opportunity of receiving it, as it accrues due half yearly. The word "transferable," I agree with Lord Justice *James*, is a word of the widest import, and includes every means by which the property may be passed from one person to another. Now, the word "assigns" has occasioned some difficulty here. I confess it does not present to me so much difficulty, because it is in association with "executors or administrators;" and

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in the present case I do not see why, after the payments had become due, the incumbent, if he pleases, should not assign over that to his butcher or baker or anybody else to receive the money for him. However, that is not the question before me; but clearly the words "shall not be transferable at law or in equity," do say that he shall not be at liberty to encumber it either directly by assignment or indirectly by suffering a judgment. Now here the claimant, the person who proposes to set up this counter-claim, cannot claim as assignee of the arrears. He claims under a judgment anterior to the accruing of the arrears; and therefore, if his contention is right, he claims by virtue of a judgment which he contends amounts to an incumbrance or charge on the pension, which would have exhausted it during the whole of the life of the incumbent. That would be to say that it has been transferred indirectly by the operation of law—giving that effect to the judgment. That I think would be entirely contrary to the Act, and, therefore, I agree with my learned brethren in thinking that the judgment of the Master of the Rolls is quite right.

Solicitors: *Parkers; Venn & Woodcock.*

M. W.

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WHITING TO LOOMES.

Stamp Act, 1870—*Stamp Duty—Vendor and Purchaser—Mortgage Deed—Ad valorem Stamp.*

24 Ch D 119
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A ten shilling deed stamp on a mortgage deed is insufficient: therefore a purchaser is entitled, on a contract for sale with a mortgagor, to require the mortgage deed, where so stamped, to be stamped before completion to the full *ad valorem* duty at the vendor's expense, notwithstanding that the mortgagee may have consented to join in the conveyance.

THIS was an appeal from a decision of the Master of the Rolls (1).

The question arose on a contract for sale of a public-house, which had been mortgaged to Messrs. *Meux & Co.* for £2100 and interest and further advances. It was agreed that the mortgagees should join in the conveyance, and the purchaser objected that the mortgage deed, which bore only a 10*s.* deed stamp, ought to be stamped with the full *ad valorem* stamp.

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(1) 14 Ch. D. 822.

A summons was accordingly taken out under the *Vendor and Purchaser Act*, and the Master of the Rolls having decided that the mortgage deed ought to be stamped with the full *ad valorem* stamp, the vendor appealed.

Davey, Q.C., and *Arthur F. Leach*, for the Appellant, urged the same arguments as in the Court below, and further contended that the deed, being a mortgage for an unlimited amount, was good as a mortgage deed up to the amount covered by the 10*s.* stamp; and as a deed was admissible in evidence for a collateral purpose: *Matheson* v. *Ross* (1); *Rutty* v. *Benthall* (2).

Bardswell, for the Respondent, was not called upon.

JAMES, L.J.:—

The Master of the Rolls said in this case, "When I say the question is unarguable, I only mean that I think so." I quite agree with the Master of the Rolls that this point is perfectly unarguable for any effectual purpose. The purchaser says, "Here is a title deed. It ought to be stamped with a proper stamp, and it is not so stamped." As long as it is not stamped with a proper stamp he cannot use it for any purpose, whether to defend his title or attack a wrong-doer. It is impossible to say he will not want it. He may have occasion to fall back on this very deed to protect himself against an incumbrancer of the equity of redemption, and for the purpose of deducing the legal title, and therefore the deed is still in effect a deed. It cannot be set aside, nor could it be safely put in the fire on the ground that it had answered its purpose. The purchaser wants it as part of his title, and has a right to have it in a state in which it will be available. The deed must be stamped. The appeal will be dismissed.

COTTON, L.J.:—

I am of the same opinion. The purchaser may clearly require this as a deed for certain purposes, even if he may not hereafter require it as a mortgage deed. Then can it be put in evidence? It cannot as a mortgage deed, because it is not properly stamped. But it is said it is sufficiently stamped as a deed, and therefore can be put in evidence. It is not a deed *simpliciter*, but what is described in the schedule to the Act as a mortgage deed, and when we look at the schedule we find that the only thing that can be properly stamped with a 10*s.* stamp is a "deed of any kind whatever not otherwise described in this schedule." But this is described in the schedule otherwise than as a deed *simpliciter*. It is described as a mortgage deed, and therefore the 10*s.* stamp is not sufficient to let it in as a deed for the purpose of shewing that the legal estate has been conveyed.

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(1) 2 H. L. C. 286.

(2) Law Rep. 2 C. P. 488.

The cases which have been referred to have really no application whatever, whether they are right or wrong. In *Evans* v. *Prothero* (1) a receipt was admitted, although not duly stamped, as evidence of a contract, not as anything that required a stamp under the Act of Parliament, but as something that did not require a stamp under the Act. Here, if this is required by the purchaser, it must be required as something that does require a stamp, and the stamp it bears is not sufficient. So in the case of the document which contained an assent to a certain deed (2). It was not required as a deed or power of attorney, but simply to prove the written assent to what had been done. In my opinion the objection of the purchaser is well founded.

Lush, L.J.:—

I am of the same opinion. The Court is not entitled to speculate whether the purchaser may or may not have occasion to use the deed. A purchaser is entitled to have every deed forming a step in his title in such a shape that he can, if he needs it, give it in evidence.

Solicitors: *Loxley & Morley; Hunters, Gwatkin, & Haynes.*

(1) 1 D. M. & G. 572. (2) *Rutty* v. *Benthall* (Law Rep. 2 C. P. 488).

M. W.

Ex parte ARMITAGE. *In re* LEAROYD, WILTON, & CO.

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C. J. B.
Dec. 13.
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21ChD 553
556_8

Court of Bankruptcy—Jurisdiction—Discretion—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 72.

Although, as a general rule, cases in which the trustee in bankruptcy is asserting a claim to property by a higher title than that of the bankrupt himself ought to be tried in the Court of Bankruptcy, yet the rule is not an inflexible one, but the Court has a judicial discretion to be exercised with regard to all the circumstances of the case.

Held, that the fact that a large amount was at stake, and that questions of character were involved, were sufficient grounds for refusing to allow a case, in which the trustee in a liquidation was seeking to set aside some transactions of the debtors as fraudulent under the bankruptcy law, to be tried in a County Court.

FRANK WILTON, Edward Learoyd, and *Sidney Learoyd,* who were partners, as woollen and general merchants, under the firm of *Learoyd, Wilton, & Co.*, filed a liquidation petition in the *London* Bankruptcy Court on the 30th of September, 1879. The proceedings in the liquidation were afterwards transferred to the *Huddersfield* County Court.

The trustee in the liquidation alleged that the debtors had, between the 5th of May, 1879, and the 13th of September, 1879, with intent to defeat and delay their creditors, made fraudulent transfers of goods, to the value of £6300, to *Albert Allen* and *C. G. Penney*, or one of them, and that the creditors had been in fact defrauded and defeated by such transfers. The trustee also alleged that, during the same period, the debtors had made divers payments to *Allen* and *Penney*, or one of them, of various sums of money, which payments were fraudulent and void as against the trustee. It was alleged that these transfers and payments were made when the debtors were insolvent, and that *Allen* and *Penney* were fully aware of their circumstances; that *Allen* and *Penney* knew that the debtors were obtaining goods on credit for the mere purpose of pledging them, and that they were parties to the fraud. On the 2nd of October, 1880, the trustee served on *Allen* and *Penney* a notice of his intention to apply to the County Court for an order declaring that the transfers of goods and the payments

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in question were fraudulent and void as against the trustee, and that *Allen* and *Penney*, or one of them, might be ordered to deliver to the trustee the said goods and moneys, or to pay to him the moneys, and the value of the goods. The trustee also gave notice that he should apply to the Court for a direction that certain issues of fact relating to the alleged fraudulent transfers and payments should be tried by a special jury, and that the Judge should settle the issues to be tried.

Upon the hearing of this application it was contended on behalf of *Allen* and *Penney* that the case was not one in which the Court of Bankruptcy ought to exercise its special jurisdiction under sect. 72 of the *Bankruptcy Act*, 1869, but that the question ought to be left to be tried in an action in the High Court. The Judge, however, made an order that, it appearing to the Court that there were questions of fact arising on the motion which ought to be tried by a jury, it was ordered that such questions of fact be tried accordingly in the County Court, and that the evidence upon such trial be taken *vivâ voce*. And it was ordered that the issues of fact to be submitted to the jury be settled by the Court in the event of the parties not being able to agree upon them.

Allen and *Penney* appealed to the Chief Judge. The appeal was heard on the 13th of December, 1880.

De Gex, Q.C., *Winslow*, Q.C., and *Sidney Woolf*, for the Appellants:—

The case is not one proper to be tried before a County Court jury, even though there may be jurisdiction to try it under sect. 72: *Ex parte Dickin* (1).

E. Cooper Willis, and *Warmington*, for the trustee:—

Every case in which the trustee claims under a higher title than that of the bankrupt himself is proper to be decided in bankruptcy: *Ex parte Brown* (2). It is now too late to take the objection: *Ex parte Butters* (3).

They also referred to *Ex parte Anderson* (4).

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(1) 8 Ch. D. 377.

(2) 11 Ch. D. 148.

(3) 14 Ch. D. 265.

(4) Law Rep. 5 Ch. 473.

BACON, C.J.:—

Having regard to the decision in *Ex parte Anderson* (1), which is one of the earliest cases in which this question arose, there can be no doubt about the trustee having a right to bring this case before the Court of Bankruptcy. But then arises the question which occupied the attention of the Court of Appeal in the more recent case of *Ex parte Dickin* (2), whether it is expedient or necessary that the trial should take place before the Court of Bankruptcy. Now the present applicants desire to have the case tried by a jury, and more than that, by a special jury. In that state of things it comes before the Court, and then when the case is explained it appears there are grave imputations against the parties now appealing. The trustee says that if the question be tried by jury, it should be tried by a County Court jury of five in the ordinary way. The Appellants say it requires a special jury. The question is of very grave importance. The transaction took place in *Huddersfield.* Mr. *Willis* has been instructed to state that the trustee has forty witnesses. In a case so described to me, I do not think it expedient that it should be tried by a jury of five. I think the order is wrong, and that the Appellants have a right, having regard to *Ex parte Dickin,* to have the case tried in some other way than by a jury of five.

The order of the County Court must be discharged.

The order of the Chief Judge as drawn up was prefaced with a statement that it appeared to the Court that it was not expedient for the County Court to exercise jurisdiction in the matter.

From this decision the trustee appealed. The appeal was heard on the 10th of March, 1881. C. A.

E. Cooper Willis, and *Warmington,* for the Appellant:—

The Court of Bankruptcy ought to exercise its extraordinary jurisdiction under sect. 72 of the *Bankruptcy Act,* 1869, to determine any case in which the trustee of a bankrupt is claiming property by virtue of a higher title than that of the bankrupt himself,

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(1) Law Rep. 5 Ch. 473.

(2) 8 Ch. D. 377.

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where his claim is founded on the bankruptcy law. Cases of that kind are particularly fitted to be tried in the Court of Bankruptcy: *Ex parte Brown* (1); *Ex parte Butters* (2).

[JAMES, L.J.:—Is there any case in which it has been held that the County Court is the proper Court to decide upon a question of character? Your case is equivalent to an indictment for misdemeanour.]

We say that the transfers in question were acts of bankruptcy, and that the bankruptcy law should be administered by the Court of Bankruptcy. *Ex parte Dickin* (3) and *Ex parte Musgrave* (4), which will probably be cited against us, are distinguishable. In them the matter in question was wholly outside the bankruptcy.

The jurisdiction is given to the County Court Judge by the Act, and sect. 66 gives him, for the purposes of the Act, in addition to his ordinary powers, all the powers and jurisdiction of a Judge of the High Court of Chancery. He, in the exercise of his discretion, has determined to try the case, and his decision ought not to be overruled except on very strong grounds. In *Ex parte Anderson* (5) the Chief Judge held that there was no appeal from an order of a County Court Judge directing the trial before himself of issues of fact, when he had jurisdiction to make the order. The order of the Chief Judge states that it is not expedient for the County Court to exercise jurisdiction in the matter; some reason ought to have been stated for reversing the decision of the County Court Judge. We are quite willing that the case should be tried by the Judge, or that it should be sent for trial to the *Bradford* County Court. The different Courts of Bankruptcy can act in aid of each other in bankruptcy matters: *Bankruptcy Act*, 1869, s. 74; *Ex parte Fletcher* (6). In the County Court the jurors are selected from the same list as in the High Court, and the Registrar could select special jurors.

De Gex, Q.C., *Winslow*, Q.C., and *Sidney Woolf*, for the Respondents, were not heard.

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(1) 11 Ch. D. 148.

(2) 14 Ch. D. 265.

(3) 8 Ch. D. 377.

(4) 10 Ch. D. 94.

(5) 39 L. J. (Bkcy.) 32. WM 7 0/6

(6) 6 Ch. D. 350.

JAMES, L.J.:—

It appears to me that the order of the Chief Judge ought to be affirmed. I do not wish in any way to withdraw from or qualify what has been said in the cases which have been referred to, viz., that cases which involve brankruptcy law, which involve the peculiar and paramount right of the trustee in a bankruptcy as distinct from the right which he takes as representing the bankrupt, are, ordinarily speaking, fit and proper to be tried in the Court of Bankruptcy. But it was not intended to decide that in cases of that kind the Court should never be able to exercise its judicial discretion not to assume the trial of the case. They merely laid down a general rule. But where are you to draw the line? It is difficult to draw it exactly. Some cases are well within it, and some are well without it. Here we have a case involving £6000, involving to a very considerable extent the character of persons apparently occupying very respectable positions, and hitherto probably of unblemished character. They desire that the question should not be tried in the County Court, they desire to have the assistance of counsel, they desire to have a special jury, and they desire to have the machinery which is usually employed where so large an amount is at stake, and where character is involved. Not only so, but the trustee himself, in applying to the County Courts, pressed for a special jury, and even before us his counsel, feeling, no doubt, that there may be some very good reason for removing the case from this particular town with the limited jury list which the County Court could command, have suggested that it might be transferred to another County Court. It appears to me that it would be inexpedient to do that, and that the case ought to be tried by an action in the High Court of Justice.

COTTON, L.J.:—

I am of the same opinion. The Chief Judge did not base his order on the ground that there was no jurisdiction in the County Court to try the case, or to direct the way in which it should be tried, if there was jurisdiction to entertain it, but simply on the ground that, as a matter of discretion, it was not expedient that such a question should be tried in the County Court. I agree with him. The only difficulty is this,—if it is a matter of discretion, ought the Chief Judge to have interfered with the discretion of the Judge of the County Court? In my opinion, though a Court of Appeal should be very unwilling to interfere with the discretion given to the Judge of the Court below, there are circumstances in the present case which justified the Chief Judge in interfering. It has been pointed out by Lord Justice *James* that the very notice on which the order appealed from was made shewed that the case was one which should not be tried in the ordinary way by the County Court Judge, but that there should be, not only a jury, but a special jury. In fact, a special jury there cannot be. By accident, in picking out the names of the jurors, it may be that they happen to be on the special jury list, but that is not a special jury. The very notice, therefore, on which the order was made shewed that there was something exceptional in the case, and that alone would justify the Chief Judge in inquiring into the circumstances of the case, and in seeing whether, in the exercise of a proper discretion, it was one which ought to be sent to the High Court or tried in the County Court. In my opinion, having regard to the facts of the case, it is much better, if one party desires it, that it should be tried in the High Court, and that the trustee should bring such action as he may be advised. As regards the authorities, Lord Justice *James* has said that which I was about to say. I understand the rule which they lay down not to be a hard and fast rule, but one which is generally to be followed—one which can be departed from whenever there are special circumstances which render it not desirable that the case should be tried in the bankruptcy jurisdiction.

LUSH, L.J.:—

I am of the same opinion. Considering the large amount at stake, which is far beyond the amount which is generally confided to the jurisdiction of a County Court, and the nature of the question to be tried, which involves the honour, and may involve the truthfulness and credibility of several persons, I think it is not expedient that it should be tried in the County Court. Further, both parties seem to agree that it is a case fit for a jury—and a special jury. A special jury as such cannot be had in the County Court. A full jury there consists of only five persons, and a

County Court is not a Court frequented by the counsel who would probably be employed in cases like this. I think all these considerations shew that it is not a case which it would be satisfactory to any of the parties to have tried in the County Court, and that the proper thing would be to make an order directing the trustee to bring an action, in order that the case may come before the ordinary tribunal.

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In re LEAROYD, WILTON, & CO.

JAMES, L.J.:—

The appeal will be dismissed with costs.

Solicitors for Appellant: *Peace & Co.*, agents for *Learoyd & Co., Huddersfield.*

Solicitors for Respondents: *Gush & Phillips.*

W. L. C.

WATSON *v.* CAVE (No. 1).

[1880 W. 3685.]

C. A.
1881
Feb. 5.

Practice—Appeal by a Person not named as a Party to the Action—Representative Suit—Person represented by the Plaintiff.

In an action commenced by a bondholder on behalf of himself and all other bondholders, the Plaintiff obtained an order for a receiver. One of the bondholders represented by the Plaintiff, being dissatisfied with the order, applied for leave to appeal:—

Held, that the order having been made in favour of the class to which the applicant belonged, and having been obtained by the Plaintiff, who represented him in the action, he could not appeal against it.

Semble, the proper course for the dissentient shareholder to pursue was to apply to the Court below to be made a Defendant to the action.

21ChD2
207
—719
22ChD39

THIS was an application, by special leave, by Mr. *F. F. Lovering* that he might be allowed to appeal from an order of the Master of the Rolls, although he was not by name a party to the action.

The action was brought by *Robert Watson* on behalf of himself and all other the foreign holders of Peruvian bonds, described in a certain decree of the Chilian Government, except such as were Defendants, against *Thomas Cave*, the *Peruvian Guano Company*, and other persons.

On the 17th of December, 1880, the Plaintiffs moved for an injunction and receiver, and the Master of the Rolls made an order that two or more persons should be appointed as receivers for the purpose of receiving the cargoes of guano shipped and to be shipped on account of the foreign holders of Peruvian bonds, except certain cargoes therein mentioned. This order was drawn up and entered on the 24th of December.

By a subsequent order of the 14th of January, 1881, the Master of the Rolls appointed two persons receivers. On the same day Mr. *Lovering*, who was one of the foreign holders of the Peruvian bonds, first heard of the order of the 17th of December, and he endeavoured to oppose the appointment of the receivers before the Master of the Rolls. His Lordship, however, refused to hear him, as he was not named as a party to the action.

Mr. *Lovering* considered that these orders were injurious to his interests, and he accordingly applied to the Court of Appeal for leave to appeal from both of the orders. The application was first made *ex parte*, but the Court refused to hear it, and gave leave to Mr. *Lovering* to make the application on service of notice on the parties to the action.

Waller, Q.C., and *Oswald*, in support of the application:—

The Plaintiff in the action does not fairly represent the interests and wishes of all the bondholders: therefore a dissentient bondholder ought to be allowed to appeal against an order obtained by him. The orders now appealed from materially affect *Lovering's* security. In ordinary suits the Court often gives leave to persons who are not parties to appeal against orders affecting their interests: *In re St. Nazaire Company* (1); *In re Markham* (2); *In re Anglo-Californian Gold Mining Company* (3).

Romer, for other bondholders, supported the application.

Chitty, Q.C., *Millar*, Q.C., and *Mulligan*, for the Plaintiffs.

Ince, Q.C., *Macnaghten*, Q.C., *Rigby*, *Creed*, *H. B. Buckley*, *Cave*, and *Snagge*, for the Defendants.

(1) 12 Ch. D. 88.
(2) 16 Ch. D. 1.
(3) 1 Dr. & Sm. 628.

JAMES, L.J. :—

It appears to me that we are asked to do something which is wholly inconsistent with the practice of the Court. No doubt a representative case like this is always accompanied by some difficulty. It is always possible that a person professing to represent the parties is not really representing them; but then the mode of remedying that is not for any person who thinks himself aggrieved to appeal from an order which has been professedly made on his behalf, but to make some application to the Court below, where, if a proper case is made out, no doubt the Court would allow such person to be added as a Defendant, and then he could apply as a Defendant to get rid of the order, or to take the conduct of the suit out of the hands of the Plaintiff, who professes to represent, but does not in truth represent, the wishes of the great body of the bondholders. If Mr. *Lovering* could appeal, every other bondholder would have a like right; and if we decided against Mr. *Lovering* on the appeal, somebody else might appear to say that Mr. *Lovering* did not represent him, or did not do it well, and therefore he had a right to do it. It appears to me that we cannot give this leave, because it would be to enable every person in a representative suit to destroy the representative character of the suit and to take up the matter for himself. If there be any wrong done, I have no doubt the Court below will rectify that wrong by giving the parties leave in some way or other, as Respondents, to make such application as they may be advised. The case before us has really nothing to do with the cases to which we have been referred, where an order was made against a body represented by *A.*, and *A.* did not take the proper steps to rectify that order, and then somebody else was allowed to come in and take up the cause in the same representative character.

COTTON, L.J. :—

I am of the same opinion. I should not add anything to what the Lord Justice has said, but I think that the matter is of some importance and some novelty. First of all, the case is not like those cases which have been referred to, where a decree or order is made binding the estates or interests in properties of various individuals who are represented by some persons on the record—then the Court will, under some circumstances, allow a person interested in the property to appeal if the party representing him on the record, and against whom the order has been made, does not wish to do so. But this is quite a different case. It is a suit called a representative suit, and the Plaintiff sues on behalf of himself and all others who have the same interest as himself, that is, not all those who take the same view of what is for their benefit, but all those who, being interested jointly with him in some property, have not taken any steps to assert their rights adversely to those which the Plaintiff chooses to assert. That is a suit rather difficult of management, but it must be dealt with as if all those persons were named Plaintiffs on the record. Here the Plaintiff, who has the actual management of the suit, has applied for and obtained an order which does not bind any property, or any interest in property, of an absent party, but produces an effect which one of the persons who are Plaintiffs by representation thinks is not for his benefit, although the actual Plaintiff on the record thinks it is. Where there is an order obtained by *A. B.* and *C. D.* as plaintiffs, and *A. B.* thinks it beneficial and *C. D.* disagrees, the proper course is not to appeal, because it is an order obtained by *C. D.* as much as by *A. B.*, but to take steps either to prevent *A. B.* any longer having the conduct of the cause, or to get *C. D.* struck out from being a plaintiff and made a defendant, when he may resist anything which *A. B.* seeks to do, and which he thinks is not advisable to have done.

It is not right to say what course ought to be adopted, but there are many courses which, in my opinion, might be taken. Certainly, in the first instance, the application ought to be made to the Court below and not to the Court of Appeal, which can only entertain an application to review, by way of appeal, the decision of the Court below.

Solicitors for *Lovering: Duignan, Smiles, & Co.*

Solicitors for the other parties: *Rooks & Co.; T. Cave; Markby, Stewart, & Co.; J. Neal; Harrison, Beal, & Harrison; Batten & Co.; G. S. & H. Brandon; Travers-Smith & Braithwaite.*

M. W.

WATSON *v.* CAVE (No. 2).

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1881
Feb. 19.

[1880 W. 3685.]

Practice—Withdrawal of Appeal—Revocation of Withdrawal.

The Defendant in an action having given notice of appeal against an order, wrote to the Plaintiff saying that he proposed to withdraw his appeal, and asking for his consent to his doing so. The Plaintiff at once consented to the withdrawal. Two days afterwards the Defendant wrote to say that he was under misapprehension as to a material fact, and intended to go on with the appeal. No step was taken by either side to remove the appeal from the list of appeals, and both parties filed affidavits in support of their case:—

Held, that the Defendant had no power to revoke his withdrawal of the appeal, and that the appeal could not be heard.

THIS was an appeal by Mr. *Cave*, one of the Defendants in the above-mentioned action, against an order of the Master of the Rolls.

By this order, which was made on the 17th of December, 1880, it was ordered that two or more proper persons should be appointed receivers for the purpose of receiving certain cargoes of guano, shipped and to be shipped on account of the foreign holders of Peruvian bonds, and that such of the Defendants as should receive the bills of lading for such cargoes should deliver them to the receivers, and that such receivers should be at liberty to sell the same cargoes. This order was passed and entered on the 24th of December, 1880.

On the 10th of January, 1881, the Defendant *Cave* gave notice of appeal from the order of the 17th of December.

On the 26th of January, 1881, the Defendant's solicitor wrote to the Plaintiff's solicitors as follows:—

"I propose to withdraw the appeal from the order made by the Master of the Rolls on the 17th of December last. Please hand me your consent to the withdrawal of the appeal. My client will of course pay your proper costs of the appeal. In the event of your not consenting, I must ask you to treat this letter as without prejudice."

The Plaintiff's solicitors replied to this on the same day as follows :—

"On the other side we send you our consent to withdraw the appeal upon payment of costs. Our briefs have been delivered."

On the 28th of January, the Defendant's solicitor wrote to the Plaintiff's solicitors a letter in which he said :—

"When I wrote my letter to you of the 26th instant, my clients were under a misapprehension as to a matter of fact which it was material for them to know in deciding whether to proceed with the appeal or to withdraw it. That misapprehension has to-day been removed, and it is now their intention to proceed with the appeal. I write, therefore, without a moment's delay, to give you notice that I no longer propose to withdraw the appeal from the order of the 17th of December last, and that it will be proceeded with."

On the 29th of January the Plaintiff's solicitors replied that the appeal having been withdrawn by consent, they refused to consent to its being prosecuted.

The appeal was nevertheless brought on to be heard, and the Plaintiff filed affidavits in answer to the Defendant's affidavits in support of the appeal.

On the appeal having been opened,

Chitty, Q.C. (*Millar*, Q.C., and *Mulligan* with him), for the Plaintiff, took the preliminary objection that the Defendant had withdrawn his notice of appeal, and could not now be allowed to proceed with it.

Kay, Q.C., and *Rigby* (*Romer* and *G. Cave* with them), for the Appellant :—

The appeal has never been actually withdrawn. All that was done was, that the Appellant wrote stating his intention to withdraw the appeal, and two days later, before any step had been taken by either side to strike out the appeal, the Appellant having in the meantime received notice of a circumstance materially affecting his position, wrote again stating that he receded from his intention to withdraw the appeal. When an order is heard in

Court by consent, it is open to either party to revoke his consent before the order is drawn up. In the present case, until something was actually done—until the appeal was struck out or some other formal step taken—there was a *locus pœnitentiæ* on either side.

Ince, Q.C., *Grosvenor Woods*, *Snagge*, and *Creed*, for other parties.

JAMES, L.J.:—

I consider that it would be *pessimi exempli* if we were to allow such a withdrawal of the appeal as that which was contained in the letter of the 26th of January, 1881, to be rescinded. In this case, it was true that within two days the Appellant wrote rescinding his withdrawal. But it might have been after two months, and it is impossible to say what might not have been done by the Respondent in the meantime on the faith of such withdrawal. The letter of the 26th of January must be treated as a formal notice by the Appellant of his intention to withdraw his appeal, and to avoid further costs he asked for the consent of the Respondent. The proposal was accepted; and if the Appellant afterwards wished to withdraw from his withdrawal and return to his former position, his proper course would have been to apply for leave to give fresh notice of appeal. If there had been any mistake of fact under which the first notice was given, the Court might have acceded to such an application, but at present we know nothing about the facts.

LUSH, L.J.:—

I entirely concur. The proposal made on the one side and agreed to on the other, amounted to a contract which was binding on the parties, and did not require, in order that it should be perfected, that the appeal should be actually struck out of the list. If the case had come before the Court after what had taken place, we should ourselves have ordered the appeal to be struck out. The proper course for the Appellant would have been to apply for leave to renew his notice of appeal; and if he could have shewn that there had been a mistake of a serious nature, in

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consequence of which he ought to be allowed to withdraw his notice of withdrawal, the Court might have given leave. As it is, however, we know nothing about the facts. I am of opinion that when the proposal of the Appellant had been accepted, there was a contract constituted from which the Appellant was not at liberty to recede. The appeal must be dismissed with costs, but the costs payable to the Plaintiff will not include his costs of affidavits filed since the acceptance by him of the withdrawal.

Kay, Q.C., then asked leave to give notice of motion to enlarge the time for appealing, as the time had now expired.

THE COURT gave leave.

No motion to enlarge the time was made.

Solicitors *Duignan & Smiles ; Markby, Stewart, & Co. ; J. Neal ; Harrison, Beal, & Harrison ; Batten & Co. ; G. S. & H. Brandon ; Travers-Smith & Braithwaite.*

M. W.

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C. J. B.
Dec. 13.
C. A.
1881
March 10.

22 Ch D 788, 790
W N 79 1883

Ex parte DANN. *In re* PARKER.

Act of Bankruptcy—Bill of Sale—Assignment of whole Property as Security for past Debt and further Advances—Substantial Exception—Tenant Right—Contemplation of further Advances—Notice of Act of Bankruptcy.

In order that the execution of a bill of sale of substantially the whole of the grantor's property as security for a pre-existing debt and further advances may not be an act of bankruptcy, it is necessary that there should be an agreement binding the grantee to make further advances.

It is not sufficient that further advances should have been in the contemplation of the parties, the deed being stamped so as to cover them, and further advances having been actually made after the execution of the deed.

A farmer assigned by a bill of sale, as a security for a pre-existing debt and further advances, the whole of his property, except a part of his tenant right under his agreement of tenancy. That agreement provided that the tenant should be paid on quitting the farm for all fallows made in the last year of the tenancy (not exceeding a certain proportion), for all seeds duly sown by him, for all dung made during the last year, for all hay, fodder, and straw the produce of the last year, &c., at a valuation. But it was also provided that, in case of any breach or non-performance of any of the stipulations on the part of the tenant, it should be lawful for the landlord to re-enter, and that, in case no entry should be made, the landlord should on the expiration of the tenancy be entitled to an allowance from the tenant in respect of any such breach or non-performance, to be deducted from the tenant's valuation. There was no covenant or agreement binding the grantee to make further advances, though the deed was stamped so as to cover a further advance:—

Held, that the tenant right did not form a substantial exception from the deed; that the execution of the deed was an act of bankruptcy by the grantor; and that it was void as against the trustee in his bankruptcy, which commenced within three months afterwards.

Some small further advances were, in fact, made by the grantee to the grantor, soon after the execution of the deed, to enable him to pay the wages of his labourers:—

Held, that, inasmuch as the grantee had made those advances with notice of the act of bankruptcy committed by the execution of the deed, he could not retain them out of the proceeds of sale of the grantor's stock which he had seized under the deed.

Ex parte Winder (1) considered.

ON the 13th of November, 1879, *J. F. R. Parker*, a farmer at *Etchingham*, executed a bill of sale in favour of *George Dann*. The deed contained a recital that the mortgagor was then indebted to the mortgagee in the sum of £667 18*s*. 8*d*.; that the mortgagee had demanded payment of or security for the same; and that the mortgagor, not being prepared forthwith to pay the same, had agreed to secure the repayment thereof, and also of any further moneys in which the mortgagor might thereafter become indebted to the mortgagee, and interest for the same respectively, in manner thereinafter mentioned. And it was witnessed that, in pursuance of the agreement and in consideration of the premises, the mortgagor assigned unto the mortgagee absolutely all and every the household goods and furniture, plate and plated articles, household linen, books, china, and other household effects whatsoever, horses, saddles, harness, and other accoutrements, and also all the implements of husbandry, crops of corn and grain, and live and dead stock, corn, hay, straw, hop poles and other goods, chattels and effects, then being and which might at any time during the continuance of the security be in, upon, about, or belonging to the messuage or dwelling-house, and farm known as *Court Lodge* then occupied by the mortgagor, and in the stack-yards, sheds and other outbuildings and lands

(1) 1 Ch. D. 290, 560.

belonging thereto or held therewith, and in, upon, and about the lands and buildings known as *Forge Farm*, also in the occupation of the mortgagor, and in, upon, about, or belonging to every messuage or dwelling-house or farm or the appurtenances thereto which the mortgagor might thereafter occupy; but it was thereby expressly agreed that the tenant right of *Parker* under the agreement between himself and the landlord of the said farms should not be included therein, save so far as regarded the hay and straw grown on the said farms, and the hop-poles thereon. The assignment was made subject to a proviso making the same void in case the mortgagor should, immediately on demand in writing made by the mortgagee, pay the £667 18*s.* 8*d.*, and also all other moneys (if any) in which the mortgagor should thereafter become indebted to the mortgagee, and should in the meantime, until the repayment, pay interest on the same respectively as therein mentioned. Power was given to the mortgagee after default in payment to take possession of the assigned property, and to sell the same. There was also a proviso that the total principal moneys to be secured by or ultimately recoverable by virtue of the deed should not exceed £1000, and the deed was stamped to cover an advance of £1000. There was no covenant by the mortgagee to make any further advances to the mortgagor, and there was no evidence of any parol agreement to do so.

The agreement under which *Parker* held the two farms was dated the 6th of October, 1876, and it provided that he should hold them for one year from the 11th of October, 1876 (from which time he had possession), and so on from year to year, determinable at the end of the first or every subsequent year on six calendar months' notice in writing given by either landlord or tenant for that purpose, but so that such notice should in every case expire on the 11th of October next after the same should have been given, at the annual rent of £544 7*s.* 6*d.*, upon the terms and conditions therein mentioned. It was agreed (*inter alia*) that the tenant should be paid on quitting the farms for all fallows made in the last year, not exceeding one-fifth part of the arable land, for all seeds duly sown by him, for all dung made during the last year, including fold tail from which no crop had been taken, for all hay, fodder, and straw the produce of the last year, at a feeding price, for the hop-poles then in use upon the hop-grounds, for all underwood down to the stub, and for all tenant's fixtures then being in and upon the farm house and premises, and for all other things, except half manures, usually appraised from an outgoing to an incoming tenant, according to a valuation by two indifferent persons, one to be chosen by each party, or by an umpire to be nominated by them: Provided always, that it should be lawful for the landlord or incoming tenant, if he should think proper, to sow the necessary seeds himself. And it was agreed that in case there should be any neglect or breach or non-performance of all or any of the stipulations and agreements on the tenant's part, then and from thenceforth the term and demise should cease and be void at the following Michaelmas, and thereupon it should be lawful for the landlord to re-enter. And, in case no such entry should be made, the landlord should, on the expiration of the tenancy, be entitled to an allowance from the tenant for any breach or non-performance of any of the stipulations, terms, and conditions thereinbefore mentioned, such sum (if any) to be ascertained by the appraisers or umpire, and to be deducted from the tenant's valuation. And the application of the *Agricultural Holdings Act*, 1875, was expressly excluded.

The bill of sale was duly registered.

On the 15th of November, 1879, *Dann* advanced *Parker* £25 to enable him to pay weekly wages; and on the 22nd and 29th of November he made him further advances of £25 and £20 for the same purpose. These were the only advances which *Dann* made after the execution of the bill of sale. On the 19th of November *Dann* took possession of and removed from the farm twenty-seven tons of hay, of the value of £87 15*s.* On the 12th of January, 1880, *Dann* took possession of all the property remaining on the farm, and sold it (with the exception of certain hay, straw, and hop-poles) for £47 3*s.* On the 31st of January, 1880, *Parker* was adjudicated a bankrupt. The trustee in the bankruptcy applied to the County Court at *Tunbridge* for an order declaring the bill of sale void as against him as an act of bankruptcy, and directing *Dann* to pay to the trustee the £87 15*s.* and the £47 3*s.*

It appeared that the bill of sale included the whole of the

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bankrupt's property, except the tenant right, which was excepted from it. Evidence was given by a valuer that at the time when the bill of sale was executed the value of the tenant right was £361 8*s*. 8*d*. The Judge held that the bill of sale was valid, on the ground of the subsequent advances.

The trustee appealed to the Chief Judge. The appeal was heard on the 13th of December, 1880.

Winslow, Q.C., and *Finlay Knight*, for the Appellant:—

Ex parte Winder (1); *Ex parte King* (2); *Ex parte Ellis* (3), do not apply, for there was no stipulation by the grantee to make further advances. The tenant right was a thing of which the grantor could not avail himself to carry on his business, and the exception of it from the deed did not save the deed from being an act of bankruptcy.

De Gex, Q.C., and *Erskine Pollock*, for *Dann*:—

The hay could be taken in execution by the sheriff, though not permitted by covenant to be sold off the premises: 56 Geo. 3, c. 50, ss. 2, 3. At any rate, the amount of the valuation was a debt accruing due to the tenant, which might be attached. The reservation of the tenant right was a sufficiently substantial exception to prevent the deed from being an assignment of all the debtor's property.

Winslow, in reply.

BACON, C.J.:—

This is a question as to assignment of the whole of a debtor's property; because, although the tenant right is reserved, and it has been ascertained that it was of the value of £300, neither the tenant nor any other person could have claimed against the landlord or any incoming tenant the value of the reserved stock, except upon the terms of paying it might be twice as much as they were worth. It appears to me, therefore, clear that this is an assignment of all the available property of the debtor to secure the debt mentioned.

(1) 1 Ch. D. 290.
(2) 2 Ch. D. 256.
(3) 2 Ch. D. 797.

Then it is said that the deed is to be saved from the operation of the statute, because there was a stipulation that it should be a security for further advances. But there is no evidence that there ever was such an agreement. The parties to it have been examined. No one suggested that there was any such agreement. The stipulation in the bill of sale is only that it is to be a security for further advances, if any such advances should be made; the creditor was under no obligation or promise to make any. It is not in the least like *Ex parte Ellis* (1), where it was the intention of the parties to give the debtor further credit in order to keep him alive, and enable him to carry on his business. It is the fact that some further advances were actually made to the debtor by the creditor. But, when all the advances are taken together, they are less than the value of the hay which was transferred to the creditor by the bankrupt. So that the advances were, in substance, not advances at all. The holder of the bill of sale has got more than he advanced. I am of opinion that no substantial advance was actually made. The transaction then is reduced to an assignment by a debtor of all his available assets to secure a past debt, and though it contained a stipulation that future advances should be secured by it, no such advances were really made.

I think, therefore, the decision of the County Court was wrong; and the order appealed from must be discharged.

C. A.

From this decision *Dann* appealed. The appeal was heard on the 10th of March, 1881.

Robinson, Q.C., and *Erskine Pollock*, for the Appellant:—

The bill of sale was not an assignment of the whole of the grantor's property; the tenant right, which was excepted, was a valuable asset, for it would entitle the tenant to receive at the end of his tenancy a considerable sum of money from the landlord or the incoming tenant. The evidence shews that this right was worth more than £350 at the time when the bill of sale was executed. The tenant could have raised money at the time on the security of that which is excepted.

[JAMES, L.J.:—The question is whether the excepted property

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(1) 2 Ch. D. 797.

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was such as would enable the tenant to raise money for the purposes of his business.

LUSH, L.J.:—How could the tenant assign that which the landlord had stipulated should be a security to him for the payment of the rent?]

No rent was due at the time when the bill of sale was executed. If the landlord could set off the value of the tenant right against the rent, still the land was worth the rent, and an incoming tenant would undertake to pay the rent as well as the amount of the valuation. The *onus* is on the trustee to prove that the deed comprised all the debtor's property, *Chase* v. *Goble* (1), and his own evidence proves that the exception was of substantial value. The things for which the tenant was entitled to be allowed at a valuation could have been taken in execution under the Act 56 Geo. 3, c. 50, s. 3. At any rate, the amount of the valuation could be attached under a garnishee order as a debt accruing due to the tenant.

But the bill of sale may also be supported on the ground that it was made to secure further advances, and some further advances were actually made, there being a *bonâ fide* intention at the time that further advances should be made, as is evidenced by the fact that the deed was stamped to cover a consideration of £1000. In *Ex parte Winder* (2) it was held that an assignment of the whole of the grantor's property to secure a pre-existing debt and further advances was not an act of bankruptcy, there being a contemporaneous parol agreement to make further advances, and further advances having been in fact made, though the deed contained no covenant by the grantee to make them. To support the present deed it would only be necessary to carry the principle of *Ex parte Winder* one step further. *Lindon* v. *Sharp* (3) is distinguishable, because there the further advances were purely voluntary, and there was nothing to shew that they were in the contemplation of the parties when the deed was executed.

Winslow, Q.C., and *Finlay Knight*, for the trustee, were not heard.

(1) 2 Man. & G. 930.
(2) 1 Ch. D. 290, 560.
(3) 6 Man. & G. 895.

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JAMES, L.J.:—

It appears to me that the decision of the Chief Judge is right. It was admitted before him that the bill of sale did include the whole of the grantor's property, except a portion of the valuation to which he was entitled under the agreement with his landlord. I am of opinion that that was not a substantial exception. It was an exception only of that which was required for use on the farm. It was a merely nominal exception, not an exception of anything which was of any present value to a man in the position of a farmer. It was an exception of things which were then in the ground, and which, if they remained in the ground would give him a contingent and possible right to receive some money at the close of his tenancy. To my mind nothing substantial was excluded from the bill of sale. The bill of sale was substantially an assignment of the whole of the grantor's property as security for a past debt, and it falls within the established rule that such a deed is void as an act of bankruptcy.

COTTON, L.J.:—

I think that is the conclusion to which we must come. I think there is no ground upon which we can allow the Appellant to retain the sums which he received after the execution of the deed. The execution of the deed being an act of bankruptcy, the Appellant must make out that he received those sums without notice of the act of bankruptcy. But he himself was a party to the deed, and he cannot therefore aver that he had no notice of it. It is said that the deed is not within the rule, because it is a security, not only for the past debt, but for further advances. No doubt that would be so if there had been any agreement by the grantee to make subsequent advances, but there was no such agreement. It is said that subsequent advances were actually made, and that they were in the contemplation of the parties when the deed was executed, because the deed was stamped so as to cover them. In my opinion that is not enough. If there is a contract which gives the grantor a right to call for subsequent advances, that is sufficient. But if there is nothing giving the grantor any right to further advances, if the grantee did not choose to bind himself to make any, the ordinary rule will not be ex-

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cluded, even though at the time of the execution of the deed the parties contemplated that further advances would be made. It is, in my opinion, necessary that the grantee should bind himself to make further advances.

LUSH, L.J.:—

The sole consideration stated for the giving of the bill of sale is the past debt, and there is no contract on the part of the grantee to make any further advances. All that is said is, that, if he does make any further advances, they shall be secured by the deed. Does the deed assign the whole of the grantor's property? In my opinion it does, and under its provisions the grantor may at any time demand payment of his debt *instanter*, and on non-payment may sweep away the whole of the property comprised in it. The only reservation is that of the tenant right. Is that an exception of anything substantial, anything by which the tenant could find the means of carrying on his business? The tenant right is that which the tenant would be entitled to receive on giving up his tenancy in respect of the things mentioned in his agreement with his landlord, and, as I read the agreement, the landlord stipulates that he shall have the power of setting off against the amount of the valuation any rent or damages which may then be due from the tenant. It is impossible to say that under such an agreement the tenant had any interest upon which he could raise money to enable him to carry on the business of his farm.

JAMES, L.J.:—

It is said that in order to support the bill of sale we need only go a step beyond *Ex parte Winder* (1). But, if we did that, we might go on step by step until we had done away with the whole of the law on the subject. And in *Ex parte Winder* the grantor's book debts were excepted from the assignment.

Solicitors for Appellant: *Cowdell, Grundy, & Browne,* agents for *Joseph Rogers, Tunbridge.*

Solicitors for Trustee: *Senior, Attree, & Johnson,* agents for *Charles Sheppard, Battle.*

W. L. C.

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(1) 1 Ch. D. 290, 560.

Ex parte EMMANUEL. *In re* BATEY.

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Bankruptcy of Trader—Carrying on Business by Trustee—Power of Creditors—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 14, 20, 25.

21 ChD 39
4 o d 11
11 QBD 92

The creditors of a bankrupt trader have no power to authorize the trustee to carry on the business of the bankrupt, except so far as may be necessary for the beneficial winding-up of the business.

If the majority of the creditors pass a resolution authorizing the trustee to carry on the business for any other purpose, such as the hope of making a profit thereby, the resolution is not binding upon the non-assenting minority, and the Court ought to interfere and to declare it invalid.

THIS was an appeal from a decision of Mr. Registrar *Murray*, acting as Chief Judge in Bankruptcy.

On the 12th of June, 1879, *William Batey*, a manufacturer of ginger beer and mineral waters, filed a liquidation petition. The first meeting of the creditors was held on the 2nd of July and was adjourned to the 15th of July. On the 15th of July the creditors resolved by the proper statutory majority to accept a composition of 20*s.* in the pound, payable in four instalments spread over eighteen months. The second meeting of the creditors was held on the 29th of July, 1879, when the resolutions passed at the first meeting were not confirmed, but the creditors resolved by the statutory majority on a liquidation of the debtor's affairs by arrangement, and appointed three trustees. It was also resolved "that the trustees shall be at liberty to carry on the business of the said *William Batey* for a period of twelve months, and for such further period or periods from time to time as the creditors in general meeting shall determine." The discharge of the debtor was also granted to him. These resolutions were registered on the 31st of July. The total amount of the proofs of the creditors who were present at the meeting of the 29th of July was £9733 18*s.* 3*d.*, and the amount of the proofs of the creditors who assented to the resolution was £8507 16*s.* 1*d.* In accordance with the resolution the business was carried on by the trustees, and in November, 1879, a first dividend of 2*s.* in the pound was paid by the trustees to all the creditors. On the 10th of August, 1880, another general meeting was held, which had been summoned by the trustees, and the following resolution was passed: "That the trustees shall continue to carry on the business for a further period of fifteen calendar months as from the 29th of July last." The proofs of the creditors present at this meeting amounted to £12,312 2*s.* 9*d.*, and the proofs of the creditors who assented to the resolution amounted to £10,361 16*s.* 6*d.*

Among the creditors was *E. Emmanuel,* who, at the first meeting on the 2nd of July, 1879, proved a debt of £626 in respect of jewellery supplied to the debtor. He was not present either personally or by proxy at the meeting of the 29th of July, 1879, and did not vote upon the resolutions then passed. He was not present at the meeting of the 10th of August, 1880, nor did he vote on the resolution then passed. He received notice of all the meetings. He received payment of the first dividend of 2*s.* in the pound, and also of a second dividend of 2*s.* in the pound which was paid on the 3rd of November, 1880. On the 21st of August, 1880, he, through his solicitors, gave formal notice to the trustees that he dissented from the carrying on of the business; that he was advised that the creditors could not except by unanimity confer on the trustees power to do so, and that he should (if necessary) apply to the Court to enforce his rights as a creditor, and on the 18th of October, 1880, he gave notice of motion for an order declaring (*inter alia*) that so much of the resolutions passed by the creditors as purported to authorize the trustees to carry on the business of the debtor were *ultrà vires* and not binding on the applicant.

It appeared that the trustees and the majority of the creditors were trade creditors of the debtor.

One of the trustees made an affidavit in which he said that the reason for carrying on the business for a further period of fifteen months was this, that the business was purely for a season only, that is, from April to the commencement of October, and that to call the creditors together before the expiration of the season was not fair either to the trustees or to the creditors, as the months of August and September were the two best months for business and profits in the season, so that to make up the accounts in the month of July, being near the middle of the season, would not truly shew a proper state of the trading. Therefore the creditors resolved to give the trustees a full season's trading, viz., fifteen months from the 29th of July, 1880. The trustee also said that at the meeting on the 10th of August, 1880, the propriety of immediately selling the business was fully discussed, and inasmuch as it was considered by the creditors present that there would be a difficulty in their disposing of the business on advantageous terms, it was considered by the majority of the creditors present that it would be most beneficial for the winding-up of the estate that the business should be continued for another full season.

The Registrar refused *Emmanuel's* application. *Emmanuel* appealed.

Northmore Lawrence, for the Appellant:—

The carrying on of the business for two and a quarter years was not necessary for its beneficial winding-up, and that is all which the trustee is authorized to do by sub-sect. 2 of sect. 25 of the *Bankruptcy Act*, 1869. The paramount object of the Act is the division of the assets among the creditors with all reasonable speed; *Bankruptcy Act*, 1869, ss. 14, 20, 25 (1). Sub-sect. 2 of sect. 25 is

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(1) Sect. 14 provides that "When an order has been made adjudging a debtor bankrupt, herein referred to as an order of adjudication, the property of the bankrupt shall become divisible amongst his creditors in proportion to the debts proved by them in the bankruptcy; and for the purpose of effecting such division the Court shall, as soon as may be, summon a general meeting of his creditors, and the creditors assembled at such meeting shall and may do as follows (*inter alia*): (4) They may, by resolution, give directions as to the manner in which the property is to be administered by the trustee, and it shall be the duty of the trustee to conform to such directions, unless the Court for some just cause otherwise orders."

Sect. 20 provides that "The trustee shall, in the administration of the property of the bankrupt, and in the distribution thereof amongst his creditors, have regard to any directions that may be given by resolution of the creditors at any general meeting, or by the committee of inspection, and any directions so given by the creditors at any general meeting shall be deemed to override any directions given by the committee of inspection; the trustee shall call a meeting of the committee of inspection once at least every three months, when they shall audit his accounts, and determine whether any or what dividend is to be paid; he may also call special meetings of the said committee as he thinks necessary.

"Subject to the provisions of this Act, and to such directions as aforesaid, the trustee shall exercise his own discretion in the management of the estate, and its distribution amongst the creditors. The trustee may from time to time summon general meetings of identical with sect. 95 of the *Companies Act*, 1862, under which it has been held that the liquidator of a company being wound up cannot carry on the company's business with a view to its reconstruction, and cannot enter into new contracts: *In re Wreck Recovery and Salvage Company* (1); *In re East of England Banking Company* (2). The creditors cannot by their resolution empower the trustee to carry on the business for any purpose other than that which is mentioned in sect. 25, sub-sect. 2. The majority cannot bind the minority to have the assets locked up indefinitely in this way. No doubt the trade creditors, who composed the majority, wished to go on supplying goods for the business, and the trustees wished to continue receiving their remuneration, but the Act gives no power to impose this upon the dissentient minority.

Horton Smith, Q.C., and *E. Cooper Willis*, for the trustees:—

The Appellant is estopped by his own conduct from objecting to what has been done, and indeed he has withdrawn his opposition to the first resolution. He has received a dividend which resulted from the carrying on of the business. But the carrying on of the business was only intended for the purpose of its beneficial winding-up. The creditors are the best judges of what is a reasonable time, and the trustee is to have regard to the directions given by

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the creditors for the purpose of ascertaining their wishes; he may also apply to the Court, in manner prescribed, for directions in relation to any particular matter arising under the bankruptcy.

"The bankrupt, or any creditor, debtor, or other person aggrieved by any act of the trustee, may apply to the Court, and the Court may confirm, reverse, or modify the act complained of, and make such order in the premises as it thinks just. The Court may from time to time, during the continuance of a bankruptcy, summon general meetings of the creditors for the purpose of ascertaining their wishes, and may, if the Court thinks fit, direct the Registrar to preside at such meetings."

By sect. 25: "Subject to the provisions of this Act, the trustee shall have power to do the following things (*inter alia*): (2) To carry on the business of the bankrupt so far as may be necessary for the beneficial winding-up of the same. (6) To sell all the property of the bankrupt (including the goodwill of the business, if any, and the book debts due or growing due to the bankrupt) by public auction or private contract, with power, if he thinks fit, to transfer the whole thereof to any person or company, or to sell the same in parcels."

(1) 15 Ch. D. 353.

(2) Law Rep. 4 Ch. 14.

them. When authorized by their resolution he is empowered to do that which he could not have done without. *In re East of England Banking Company* (1) has no application to the present case.

JAMES, L.J.:—

It seems to me quite clear that the resolution which authorized the trustee to carry on the business for a further period of fifteen months was *ultrà vires* the majority of the creditors. The Act evidently contemplates, as does the *Companies Act*, a carrying on of the business only for the purpose of its beneficial winding-up, not because the creditors may think that the business will be a very profitable one, and that the longer it is carried on the better it will be, and that they will make a profit from it. That is not the kind of thing which the majority of the creditors have a right to impose on the minority. Every creditor has a right to say, I want to have the estate administered, and it is only for the purpose of its administration and distribution and with a view to its beneficial winding-up that the power to carry on the business is given. It is said that the power to carry on the business is inherent in the trustee by virtue of the Act. But it is quite clear that it was never intended that the trustee should carry on the business indefinitely with the view of making profit by it as a going concern. And the affidavit of the trustees in the present case shews that the creditors did not resolve to carry on the business with a view to winding it up. They had not contemplated a sale of it, but they thought that they could make more profit by carrying it on. Therefore it appears to me that the resolution of the 10th of August, 1880, was clearly *ultrà vires* the creditors. It appears to me that the resolution of the 29th of July, 1879, was also *ultrà vires*, in so far as it authorized the trustees to carry on the business "for such further period or periods from time to time as the creditors in general meeting shall determine," affecting to give themselves power to determine from time to time indefinitely how long the business should be carried on. So far as the resolution authorized the trustees to carry on the business for twelve months, it might very well be said that it was in spirit a

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(1) Law Rep. 4 Ch. 14.

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compliance with the Act, as it might well have been understood as passed with a view to the beneficial winding-up of the business. Twelve months was a long time, but not necessarily an unreasonable time. But it would be impossible now for Mr. *Emmanuel*, or any other creditor, to object to what was done within the twelve months. No relief, however, is asked in respect of that. But in regard to the second resolution, it cannot be said that there is any estoppel against the Appellant, for he was not present at the meeting, and as soon as he knew what had been done he protested against it and promptly applied to the Court, and the trustees have ever since been carrying on the business at their peril.

BRETT, L.J.:—

The only power given by sect. 25 to the trustee is a power to carry on the bankrupt's business "so far as may be necessary for the beneficial winding-up of the same." Upon the construction of sects. 14 and 20, having regard to sect. 25, it seems to me that the only power which the creditors have in passing a resolution authorizing the trustee to carry on the debtor's business, is to authorize him to carry it on to the same extent and for the same purpose as he is empowered by sect. 25 to carry it on, and that the majority of the creditors cannot bind the non-assenting minority by a resolution going beyond that. Then comes that which to my mind is a very difficult matter, under what circumstances can the Court say that the creditors have exceeded their authority? Jurisdiction would not be a proper word, the creditors have authority, not jurisdiction. If what they have done is within their authority, but it is in the opinion of the Court an erroneous exercise of their authority, I think the Court cannot interfere. But, if they have exceeded their authority, in my opinion the Court can and ought to interfere. This question depends to some extent upon what they have assumed to do. If in terms the resolution shews that they have assumed to exceed their powers, it would be clear that the Court should interfere. But, if the resolution does not shew this in terms, the Court must look at all the facts and judge from them whether the resolution was or was not intended to go beyond the powers of the creditors. In the

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present case, if the first resolution had only authorized the trustees to carry on the business for twelve months, I do not think we could have fairly inferred that it was intended to carry it on for any purpose but that of beneficially winding up the business. But when we find that the trustees are authorized to carry on the business, not only for twelve months, but "for such further period or periods from time to time as the creditors in general meeting shall determine," and we find that this was afterwards carried out by a resolution authorizing the trustees to carry on the business for a further period of fifteen months, it seems to me that the only proper inference in this case is that, when they passed the first resolution, they did not pass it for the purpose of the beneficial winding-up of the business, but that they intended to authorize the trustees to carry it on for a different and a further purpose. Therefore, it seems to me that the resolutions were beyond the powers of the creditors to pass so as to bind the Appellant, and that they ought to be set aside. We are not asked to interfere with that which is past and gone, but only so far as the second resolution is concerned. Therefore I think the order should not leave open to be questioned anything which has been done by the trustees in respect of the first year during which the business was carried on.

COTTON, L.J.:—

What we have to consider is whether the whole of the second resolution and the latter part of the first were within the power of the creditors to pass. The first question is what is the power of the trustee as to carrying on the business, independently of any resolution of the creditors. The object which the Legislature had in view in a bankruptcy is shewn by the commencement of sect. 14. After an order of adjudication has been made "the property of the bankrupt shall become divisible among his creditors in proportion to the debts proved by them in the bankruptcy, and for the purpose of effecting such division the Court shall, as soon as may be, summon a general meeting of his creditors," and the creditors may, among other things, "by resolution give directions as to the manner in which the property is to be administered by the trustee," and then sect. 20 provides that in the administration and distribution of the property the trustee "shall have regard to any directions that may be given by resolution of the creditors," and sect. 25 says what things the trustee shall have power to do, and by sub-sect. 2 it authorizes him (assuming, therefore, that without this authority he would have had no such power) "to carry on the business of the bankrupt so far as may be necessary for the beneficial winding-up of the same." The power is given simply for the purpose of the beneficial winding-up of the business, not the estate. Then sub-sect. 6 empowers the trustee "to sell all the property of the bankrupt, including the goodwill of the business, if any, and the book debts due or growing due to the bankrupt," shewing that the intention is that, subject to the qualification supplied by sub-sect. 2, where the bankrupt is carrying on a business, his property shall be at once realized, and that as soon as possible there shall be a sale of the business and goodwill. It is said that the creditors assembled in general meeting have a larger power than the trustee acting without their authority, and this appears to have been the ground of the Registrar's decision. According to sect. 14, a general meeting of the creditors is to be summoned as soon as may be, for the purpose of effecting a division of the bankrupt's property amongst his creditors, and then the creditors are to give directions as to the manner in which the property is to be administered by the trustee. It is said that this enlarges the power which the trustee would have had to carry on the bankrupt's business. In the first place, I do not think that the word "property" can be construed in that way, and, moreover, the whole of sect. 14 is qualified by the introductory part of it, which empowers the creditors to do certain things "for the purpose of effecting such division." And sect. 20 has a material bearing on the question. It provides that the trustee shall in the administration and division of the bankrupt's property have regard to any directions that may be given by resolution of the creditors, but it adds that the trustee shall nevertheless "exercise his own discretion in the management of the estate and its distribution amongst the creditors." In my opinion, the creditors have no greater power in giving a direction to the trustee to carry on the business of the bankrupt than that which is given to the trustee by sect. 25, *i.e.*, to carry it on only so far as may be necessary for its beneficial winding-up. Then, no purpose being expressed in the second resolution of the creditors for the carrying on of the business, what upon the facts of the case must we consider to have been the purpose of the resolution? In some cases, no doubt, such as, for instance, that of a large shipping business, a resolution to carry on the business for a period of two years and three months might not be inconsistent with an intention to carry it on only for the purpose of its beneficial winding-up. But, in the present case, having regard to the nature of the business, I think that the length of the time fixed by the resolutions shews that they were passed, not for the purpose of the beneficial winding-up of the business, but for quite another purpose, that is, to make a profit from carrying on the business during the drinking season of the year. The creditors thought it was not for their interest to sell the business, and that they would make a large profit by carrying it on. Their object, in my opinion, was to obtain a profit by carrying on the business during the thirsty season of the year. That, however, is not a purpose which is justified by the Act. As the Act does not give any power to use the assets in such a speculation, it is our duty to say that the resolutions are *ultrà vires*, and that they cannot stand.

JAMES, L.J.:—

There will be a declaration that the second resolution and the latter part of the first are invalid. The Appellant will have his costs out of the estate.

Horton Smith, Q.C.:—The costs of the trustees should also come out of the estate.

JAMES, L.J.:—

We make no order as to the costs of the trustees. The majority of the creditors ought to pay them out of their own pockets.

Solicitors for Appellant: *Harper, Broad, & Battcock.*
Solicitor for Trustees: *G. J. Jennings.*

W. L. C.

C. A.
1881
March 17.

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Ex parte SNOWDON. *In re* SNOWDON.

Co-Sureties—Contribution—Bankruptcy Petition—Petitioning Creditor's Debt.

A surety is not entitled to call upon his co-surety for contribution until he has paid more than his proportion of the debt due to the principal creditor, even though the co-surety has not been required by the creditor to pay anything, provided that the co-surety has not been released by the creditor.

Davies v. *Humphreys* (1) followed.

Craythorne v. *Swinburne* (2) discussed.

THIS was an appeal by *Thomas Snowdon* from an adjudication of bankruptcy made against him by Mr. Registrar *Pepys,* acting as Chief Judge in Bankruptcy.

On the 9th of December, 1876, *Snowdon, John Hall,* and *Robert Hall,* executed a joint and several bond for £2000 in favour of the *National Provincial Bank of England.* The bond contained a declaration that *Snowdon* and *John Hall* were respectively the sureties to the bank for the payment of any moneys which then were or might thereafter become due to the bank from *Robert Hall,* and there was a provision limiting the liability of the sureties to £1000 for principal moneys, in addition to interest, costs, commission, and other lawful charges. In January, 1879, the creditors of *Robert Hall* passed a resolution for the liquidation of his affairs by arrangement. At this time there was due from him to the bank £1000 for principal and also an arrear of interest. In September, 1879, *John Hall* upon the demand of the bank paid them the sum of £541 2*s.* 1*d.*, which was half the amount due to them by *Robert Hall.* On the 7th of September, 1880, *John Hall* issued a debtor's summons against *Snowdon* for £270 11*s.* 0½*d.*, half of the £541 2*s.* 1*d.* *Snowdon* committed an act of bankruptcy by not complying with the summons, and on the 23rd of December, 1880, *John Hall* presented a bankruptcy petition against *Snowdon. Snowdon* had not been called on by the bank to pay anything upon the bond, but there was nothing to shew that the bank had released him. The Registrar made an adjudication of bankruptcy. He was of opinion that, according to *Craythorne* v. *Swinburne* (2),

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(1) 6 M. & W. 153.

(2) 14 Ves. 160.

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when a surety is called on by the creditor to pay any part of the debt, he has a right in equity to call upon his co-surety for contribution.

Snowdon appealed.

Horton Smith, Q.C., and *E. Cooper Willis*, for the Appellant:—

A surety has no right to prove against the estate of his co-surety unless he has paid the whole debt or a part of it in discharge of the whole. A surety could not at law sue his co-surety for contribution until he had paid more than his share of the debt due to the creditor: *Davies* v. *Humphreys* (1); *Robson's* Bankruptcy (2).

If the Respondent does not pay the whole debt, the bank will be entitled to prove for the unpaid balance. There is no good petitioning creditor's debt.

J. E. Linklater, for the petitioning creditor:—

"A liquidated sum due at law or in equity" constitutes a good petitioning creditor's debt. The remedy of a surety against his co-surety has always been more extensive in equity than at law. In equity a surety is entitled to sue his co-surety for contribution so soon as he has paid anything to the creditor. He is not bound to wait until he has paid half the debt. The principle in equity is shewn by *Dering* v. *Earl of Winchelsea* (3). The decision of Lord *Eldon* in *Ex parte Gifford* (4), which is referred to by Baron *Parke*, in *Davies* v. *Humphreys*, was earlier in date than his decision in *Craythorne* v. *Swinburne* (5). There he says (6): "It has been long settled, that, if there are co-sureties by the same intrument, and the creditor calls upon either of them to pay the principal debt, or any part of it, that surety has a right in this Court, either upon a principle of equity or upon contract, to call upon his co-surety for contribution."

[COTTON, L.J.:—Does that mean while any part of the principal debt remains unsatisfied? Does it not mean when the surety has paid more than his share of the debt which remains due to the creditor ?]

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(1) 6 M. & W. 153, 168.
(2) 3rd Ed. p. 267.
(3) 1 Cox, 318.
(4) 6 Ves. 805.
(5) 14 Ves. 160.
(6) Ibid. 164.

In *Spottiswoode's Case* (1), Lord Justice *Turner* said (2) "that where persons are joined together for one common end or purpose, they must bear equally the expenses incident to the attainment of that end or purpose."

[JAMES, L.J.:—I think your proper remedy is to call on *Snowdon* to pay the bank £541.]

In *Lawson* v. *Wright* (3) it was held that a surety could maintain a suit against his co-surety for contribution in respect of money actually paid by the plaintiff to the creditor.

[JAMES, L.J.:—The whole of the debt claimed by the creditor had been paid by the plaintiff there.]

In the present case the bank have only called for £541. That case was followed by Vice-Chancellor *Kindersley* in *Hitchman* v. *Stewart* (4), but there the whole of the principal debt had been paid by the plaintiff. In *Whiting* v. *Burke* (5) *Craythorne* v. *Swinburne* (6) is recognised. When some among co-sureties are insolvent the rules of equity as to contribution differ from the rules of law.

JAMES, L.J.:—

I think that in this case there is no sufficient petitioning creditor's debt. There is no "legal debt" and there is no "equitable debt," there is no debt so far as either law or equity is concerned sufficient for the purpose of adjudication. The right of a surety who has paid the creditor is to have contribution from his co-sureties, that is to say, all the co-sureties must bear the whole burden of the debt equally. It is impossible to say, when one surety has paid a part of the debt, until the whole debt is paid in respect of which all the co-sureties are jointly liable, what the right to contribution is. It is suggested that a man might be a surety for £10,000, and upon paying the creditor

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(1) 6 D. M. & G. 345.

(2) Ibid. 372.

(3) 1 Cox, 275.

(4) 3 Drew. 271.

(5) Law Rep. 10 Eq. 539; Ibid. 6 Ch. 342.

(6) 14 Ves. 160, 164.

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£100 in respect of that liability he might file a bankruptcy petition against his co-surety in respect of that £100. There must be an actual legally ascertained debt before it can be made the ground of proceedings in bankruptcy. The co-surety cannot know what is the debt due to him by his co-surety until he knows what has been done in respect of the residue of the debt for which he is equally liable. I believe the proper course when a surety is called upon to pay a part of the whole debt for which he is liable would be to bring an action against his co-sureties to compel them to contribute to pay the debt to the creditor, just as he would be entitled to call on them for contribution if he had been sued by the creditor, asking that he should be indemnified by his co-sureties against paying the whole debt, or whatever risk he ran. But, until the whole debt has been paid by one surety, or so much of it as to make it clear that, as between himself and his co-sureties, he has paid all that he ever can be called upon to pay, there can be no equitable debt from them to him in respect of it. There is nothing ascertained as a debt which would give him a right to proceed against his co-sureties.

BRETT, L.J.:—

When the parties to a suretyship agreement have put into their agreement a limit beyond which they will not be liable, each of them is liable to pay to the principal creditor the whole amount for which he has made himself liable. They are only liable up to the limit agreed upon. If the debt due to the creditor does not amount to the sum for which they have made themselves liable by their bond, they are only liable to pay the amount of the debt and no more. If the debt exceeds the sum to which they have limited their liability in their own bond, their liability is only to pay the amount mentioned in their own bond. That is the limit up to which they are sureties. Upon that the first question to be determined is the amount of the liability between the original debtor and creditor. When the amount of the debt between the original creditor and debtor is ascertained, it may be that the sum which they as sureties are liable to pay is the whole of that amount, but, as between themselves (if there are only two sureties), each of them is only bound to pay a half. When does the claim of the one surety against the other for contribution arise? It is not when he has paid only his own half of the amount for which he originally became surety, but his claim arises when he has paid more than half of the whole of the debt due to the creditor. That is the doctrine which was laid down in *Davies* v. *Humphreys* (1), and it was a doctrine taken from the Courts of Equity, and adopted by the Courts of Law. The doctrine laid down in *Davies* v. *Humphreys* has never been questioned, and it seems to be absolutely in accordance with what Lord *Eldon* said in *Ex parte Gifford* (2), upon the authority of which *Davies* v. *Humphreys* was decided. There is nothing to the contrary in the other cases which have been cited, and the doctrine of *Davies* v. *Humphreys* remains untouched, that a surety has no claim against his co-sureties until he has paid more than his share of the debt due to the principal creditor. This state of things has not arisen in the present case, and therefore there is no claim by the petitioning creditor against his co-surety for a liquidated sum, and consequently there is no sufficient petitioning creditor's debt.

COTTON, L.J.:—

I am of the same opinion. What we have to decide is, whether a surety who has only paid his proportion of the debt for which he is liable can present a bankruptcy petition against his co-surety for contribution. In my opinion he cannot. To entitle him to contribution it is not necessary that he should pay more than his proportion of the sum secured by the bond by which he became surety, with a limitation as to the amount of his liability. If he has paid more than his proportion (in a case where there are two sureties, more than a moiety, of the debt due), then he can call upon his co-surety for contribution, although the amount may be nothing like the amount of the debt due by the principal debtor. Here the surety has been called upon to pay half the amount due under the bond, and if he has only paid his half, I cannot see how he can require contribution from his co-surety, who is equally liable to pay the other half of the debt to the creditor. Under such circumstances I cannot see that any equity can arise against the co-surety, and in this case, in my opinion, no equity does

(1) 6 M. & W. 153, 168.

(2) 6 Ves. 805.

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arise against the co-surety while the creditor can still call upon him for the other half of the principal debt. None of the cases which have been cited conflict with this. In *Lawson* v. *Wright* (1), the co-sureties had guaranteed a liability of £320, and the only sum due by the debtor at the time of payment was £100. The plaintiff claimed contribution from his co-surety, but he had paid more than his proportion of the only debt which was due to the creditor, and for which he had agreed to become surety. Therefore it was held that he could in equity claim contribution, because he had paid more than his just proportion of the debt due.

JAMES, L.J. :—

The adjudication will be annulled, with costs allowed here and in the Court below.

Solicitors for Appellant: *Willoughby & Cox.*

Solicitors for Petitioning Creditor: *Linklaters, Hackwood, & Co.*, agents for *F. T. Steavenson, Darlington.*

W. L. C.

PLATING COMPANY *v.* FARQUHARSON.

[1879 P. 264.]

C. A.
1881
March 23.

Contempt of Court—Motion to commit—Advertisement for Subscriptions to defend a Suit—Advertisement of Reward for Evidence.

An injunction having been granted to restrain the Defendants from infringing a patent for nickel-plating, they gave notice of appeal and published in a newspaper an advertisement inviting the trade to subscribe towards the expenses of the appeal, and also an advertisement offering a reward of £100 to any one who could produce documentary evidence that nickel plating was done before 1869. The Plaintiffs moved to commit the publishers of the newspaper for contempt of Court in publishing these advertisements, as being an interference with the course of justice, stating at the same time that they did not press for a committal, but would be satisfied with an expression of regret and an undertaking not to repeat the advertisements:—

Held, that as all persons engaged in the trade of plating had a common interest in resisting the claims of the Plaintiffs, an advertisement asking

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(1) 1 Cox, 275.

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them to contribute to the expenses of defending the proceedings was open to no objection:

Held, also, that the advertisement offering a reward for documentary evidence was free from objection.

Pool v. *Sacheverel* (1) questioned.

The Court will discourage motions to commit where no real case for committal is made, and only an apology and costs are asked for.

THIS was a motion to commit for contempt Messrs. *Jaffray* and *Feeney*, who were the printers and publishers of the *Birmingham Daily Post* newspaper.

In this action judgment had been given on the 17th of February, 1881, by Vice-Chancellor *Bacon* against the Defendants, for an alleged infringement of a patent for nickel-plating which was vested in the Plaintiffs. On the 26th of February the Defendants served notice of appeal.

On the 1st of March the following advertisement appeared in the *Birmingham Daily Post*:—

"Important Notice to Nickel Platers and Manufacturers. *The Plating Company, Limited*, v. *Farquharson and others*, trading as '*The Nickel-plating Company*.' Judgment having been given against the Defendants for an alleged infringement of *Adams's* patent process for nickel-plating, it is proposed to carry the case into the Court of Appeal, provided the trade will come forward and subscribe the necessary funds for doing so. The Defendants have been put to very great expense in defending this action, which has lasted several days, and which is really a test action, and if the verdict is not reversed it will deter any firm from practising the art of nickel-plating by any process whatsoever, except the Plaintiffs and their licensees. The matter being of urgent and vital importance to all nickel-platers, your subscription is earnestly solicited, and the Defendants venture to hope that this appeal will meet with a hearty response from all interested. Several influential firms have already come forward and volunteered to pay their share of the expenses, and the Defendants hope that their example will be followed by all in the trade. Subscriptions will be received by the Defendants' solicitor, *R. Cotton*, Esq., 26, *Lincoln's-inn Fields*, whose receipt only will be valid. All moneys not used for the purpose of the appeal will be returned *pro ratâ* to the subscribers. As the appeal must be lodged forthwith, an immediate subscription is requested."

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(1) 1 P. Wms. 675.

On the 1st, 3rd, 4th, 5th, and 7th of March, there appeared in the same newspaper the following advertisement:—

"Nickel-plating.—£100 reward to any one who can produce documentary evidence that nickel-plating was done previous to 1869.—Address, P., *Daily Post*, No. C. 5236."

The Plaintiffs' solicitor upon seeing these advertisements wrote to the publishers of the paper asking them to furnish the names and addresses of the persons inserting them, and to insert a notice withdrawing them, and also to forward an undertaking not again to insert these or any similar advertisements. The publishers replied that as to the first advertisement it was paid for over the counter in the ordinary way—that the name of the solicitor appeared in it, and that the publishers knew nothing more of the matter. They declined to insert any withdrawal.

The appeal having been set down, the Plaintiffs on the 14th of March gave notice of motion before the Court of Appeal that *Jaffray* and *Feeney* might be committed for contempt of Court in publishing advertisements having reference to the action and to the pending appeal, and tending to prejudice the Plaintiffs in the prosecution of the action and the hearing of the appeal.

Jaffray and *Feeney*, by affidavit in opposition to the motion, stated that the first advertisement was brought to their office on the 28th of February by a person whom they did not know, and was paid for over the counter, and that they had no information on whose behalf it was brought, except as might be gathered from the advertisement itself; that the shorter advertisement was brought to their office on the 23rd of February by a person unknown to them, and paid for over the counter; that they had no information on whose behalf it was brought, and that the person by whom it was brought received, according to the usual practice of the advertising office, a card entitling him to receive any answers which might be sent to the office; that they did not know that either advertisement was in any way calculated to interfere directly or indirectly, or was capable of being regarded as an endeavour to interfere, with the due course of justice; that neither they nor either of them had any interest in the subject-matter of the action; and that neither they nor either of them were or was acting directly or indirectly in collusion with the Defendants.

Aston, Q.C., and *Seward Brice*, for the motion:—

Though we say that these advertisements are a contempt of Court as tending to interfere with the course of justice, the Plaintiffs do not wish to push matters to extremities, and will be satisfied with an expression of regret by the publishers, and an undertaking not to publish any more such advertisements. The first advertisement is for subscriptions to prosecute an appeal.

[JESSEL, M.R.:—What is there improper in that? It is only an advertisement to the trade, and the trade have a common interest.]

There is no reported case shewing that such a contribution is legal.

[JESSEL, M.R.:—It has been repeatedly decided to be so.

JAMES, L.J.:—I think it not only lawful, but legitimate and proper.]

Then as to the advertisement for evidence, *Pool* v. *Sacheverel* (1) is in point.

[JESSEL, M.R.:—Has that case ever been recognised?]

It is referred to by Lord *Cottenham* as an authority in *Lechmere Charlton's Case* (2). Offering a reward for evidence operates as a bribe to give false evidence.

[JESSEL, M.R.:—It is common to advertise for certificates. They very often cannot be got in any other way.]

The offering a large reward is a temptation to forgery.

[JESSEL, M.R.:—When *Pool* v. *Sacheverel* comes to be looked at it appears that the advertisement was for oral evidence to prove that the persons named in a registry of marriage were different persons from those the defendant alleged them to be. Here the advertisement is only for documentary evidence.]

(1) 1 P. Wms. 675.

(2) 2 My. & Cr. 316, 340.

Davey Q.C., and *Beale*, for the publishers, were not called upon.

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JESSEL, M.R. :—

This is an application against the printers of a newspaper to commit them for contempt of Court in inserting two advertisements. The printers received the advertisements in the ordinary course of their business, with no more intention of interfering with the course of justice than the printer's boy who carried the paper to the printing men ; and in order to commit them for contempt the Plaintiffs must shew that the advertisements themselves were on their face such that a person of ordinary intelligence conducting a newspaper must have known that the publication of them was an interference with the course of justice. Now, not only is nothing of the kind shewn, but as far as I can see there is no ground whatever for impeaching the propriety of the advertisements. The first advertisement complained of follows an advertisement by the Plaintiffs in the action, who have succeeded before Vice-Chancellor *Bacon* in obtaining a judgment against the Defendants to the effect that the Defendants have infringed their patent, which is called " *Adams's Patent for Nickel-plating ;*" and the Plaintiffs inserted in the *Birmingham Daily Post—Birmingham* being the place where I suppose this nickel-plating goes on—an advertisement stating that there had been a recent judgment which fully established their exclusive right. Whether that is quite accurate or not it is not now necessary to consider, because the motion is not against the Plaintiffs for inserting that advertisement, but by the Plaintiffs against somebody else ; and I only remark upon it for the purpose of saying that the Plaintiffs do not appear to be very careful themselves as to stating exactly what the true state of matters is ; because this advertisement was inserted after notice of appeal had been given, and therefore it is not accurate to say that the Plaintiffs' exclusive right was fully established. The Defendants advertised to this effect :—" Judgment having been given against the Defendants for an alleged infringement of *Adams's* patent process for nickel-plating, it is proposed to carry the case to the Court of Appeal, provided the trade will come forward and subscribe the necessary funds for doing so." Then they go on to say that they have been put to very great expense, and that if the verdict is not reversed it will deter any firm from practising the art of nickel-plating by any process whatever, except the Plaintiffs and their licensees. The first part of that advertisement is a statement of fact; the second is matter of opinion, namely, whether it will deter or not. Then the advertisement goes on to say this: "The matter being of urgent and vital importance to all nickel-platers, your subscription is earnestly solicited, and the Defendants venture to hope that this appeal will meet with a hearty response from all interested." Then they say: "Several influential firms have already come forward and volunteered to pay their share of the expenses, and the Defendants hope that their example will be followed by all in the trade." I am utterly at a loss to know what there is improper in that advertisement. All the trade is interested in freeing the trade from monopoly of any kind, whether by patent or otherwise; and we know that it is customary for the members of a trade to combine for that purpose, on the same principle that people claiming a right of common are allowed to combine to assist a defendant who is interfered with by the lord, on the ground that right of common does not exist, the doctrine being that where you have a common interest you have a right to contribute to the defence. It is, within my certain knowledge, and has been for many years, a common practice that if a patentee attacks one manufacturer the other manufacturers combine together to defend the case, so that the whole expense shall not be thrown on the one that is attacked. Otherwise, they might be attacked in detail, and although it might be a bad patent, they might all lose their cases owing to the great expense of defending them effectually. That being so, I can see nothing to be found fault with in this advertisement, and certainly nothing to inform the printer that it was an interference with the course of justice.

The other advertisement is this: "Nickel-plating.—£100 reward to any one who can produce documentary evidence that nickel-plating was done previous to 1869." It is said that this may induce people to forge documents. But £100 is not such a very large sum as necessarily to have that tendency. Documentary evidence is not very easily forged, and I do not think it is very likely that people would come forward and tender a forged document for a reward of £100. Such a notion appears to me to be wild, and not founded on any reasonable conclusion as to the effect of such an advertisement, which I think is a very harmless one. Advertisements of a similar nature are very common. You advertise for a lost deed or a lost will, or you advertise for a certificate of marriage or of baptism, to prove heirship or kinship. That is done as a matter of course. Generally, no doubt, the amount of the offer is not quite so large as £100, but sometimes it is; and I never heard it suggested that those advertisements were illegal, or were not a proper mode of obtaining evidence. In my opinion, therefore, there is no objection to either of the advertisements.

I must add that the practice of making these motions against innocent people like the editors or proprietors of newspapers ought to be discouraged as far as possible. They lead to great waste of time and to a considerable amount of costs, and, unless the Court is satisfied that the publication is a contempt which interferes with the course of justice, of course the Court ought not to interfere. As regards the case that has been cited of *Pool* v. *Sacheverel* (1), I do not profess to understand it as it is reported. The advertisement seems to have been an advertisement for oral evidence to disprove a marriage, by shewing that a marriage certificate, which was alleged to refer to two persons not having the names mentioned in the certificate, applied in fact to two persons who really bore those names. That was treated by Lord *Macclesfield* as being a direct inducement to subornation of perjury. Of course, if it was an attempt to suborn witnesses, it would be a contempt of Court, and an undue interference with the course of justice. With great respect, however, to that learned Lord Chancellor, I should not have come to the same conclusion on the same facts; and it does not appear to me that an advertisement for a witness to prove a thing not in the knowledge of the man who advertises for it, but which he believes to be true, can be treated as subornation of perjury, because subornation of perjury means doing something to induce people to come forward to prove that which the person seeking to prove it believes to be false; and on that distinction, it appears to me, the case ought to turn. However, it is not necessary now to say more than that that case does not apply to the case before us, inasmuch as the evidence there advertised for was oral and not documentary, and the application was not made against the editor or printer of the newspaper, but against the person who caused the advertisement to be published, but I reserve to myself the fullest power of saying that if ever such a point should come before me, sitting in the Court of Appeal, I should feel myself at liberty to disregard the conclusion which was come to by the Lord Chancellor in that case.

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(1) 1 P. Wms. 675.

James, L.J.:—

I am of the same opinion. If the motion had been made against the Defendant himself, I think it must have failed. Made against the proprietors of the newspaper, who only inserted this advertisement in the ordinary course of their business, it seems to me to be idle and extravagant, and a thing to be strongly discouraged. In regard to the case referred to, I am unable to reconcile it with the well-established practice of the Government of the country of offering rewards for evidence in criminal cases.

Cotton, L.J.:—

I have arrived at the same result, and I need not repeat the reasons for our decision, which have been given by the Master of the Rolls; but I should like to add one word, namely, that I entirely disapprove of motions to commit where there is no real case for committing the party against whom the motion is made, and where the counsel in opening the case says, "I do not ask for a committal; all that I ask for is an apology and payment of costs." Motions made in that sense and view are, in my opinion, a mere waste of the time of the Court, and ought to be discouraged. My own view is that where there is no case for a committal the party moving ought to have no costs of his motion. I mention this upon the present occasion that the Court of Appeal may not in future be troubled with motions where there is really no case for committing the person against whom the motion is made.

Jessel, M.R.:—I think I ought to express my entire concurrence with what Lord Justice *Cotton* has said.

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James, L.J. :—I certainly in such cases would not only not give the party moving his costs, but I should be inclined to make him pay costs. I think these motions are a contempt of Court in themselves, because they tend to waste the public time.

Davey :—In motions to commit, the Court sometimes gives costs as between solicitor and client. If your Lordships think you have jurisdiction to do it, I ask for costs as between solicitor and client in the present case.

Jessel, M.R. :—Costs as between solicitor and client are sometimes given to the party moving, but I do not remember any case where they have been given to the respondent.

James, L.J. :—I think that costs as between solicitor and client may sometimes be given to the party moving by way of indemnifying him, instead of committing the respondent, but I do not think they can be given to the respondent.

Cotton, L.J., concurred.

Motion refused with costs.

Solicitor for Plaintiff: *W. Foster.*
Solicitor for Respondent: *Spencer Whitehead.*

H. C. J.

C. A.

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C. J. B.
Nov. 15.

C. A.
1881
March 17, 24.

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Ex parte STUBBINS. *In re* WILKINSON.

Act of Bankruptcy—Fraudulent Transfer of Goods—Fraudulent Preference—Sale of Goods to Co-Trustee—Application of Purchase-money to make good Breach of Trust—Bankruptcy Act, 1869 (32 *&* 33 *Vict. c.* 71), *ss.* 6 (*sub-s.* 2), 92.

An actual sale of goods for money, the vendor intending to use the purchase-money in making a voluntary payment and the purchaser knowing of that intention, is not a fraudulent transfer within sect. 6 (sub-sect. 2) of the *Bankruptcy Act*, 1869.

A voluntary preference of a creditor, though it can be set aside as a fraud on the bankrupt law, is not an act of bankruptcy.

If a debtor on the eve of bankruptcy voluntarily makes good trust money which he has misapplied, the payment cannot be set aside as a fraudulent preference of the trust estate.

Within three months before the filing of a liquidation petition the debtor, who was one of the executors of a will, sold some goods to his co-executor with the intention of applying the purchase-money in repaying to the testator's estate money which he had improperly abstracted from it. This intention was known to the co-executor, and the purchase-money was, with his knowledge, immediately after its payment by him, paid by the vendor into a bank to the credit of the executors:—

Held, by the Court of Appeal, that the transaction was not either a fraudulent preference within sect. 92 of the *Bankruptcy Act*, 1869, or a fraudulent transfer of property within sect. 6 (sub-sect. 2), and that neither the co-executor nor the testator's estate could be compelled to refund the money.

Decision of *Bacon*, C.J., affirmed.

ALFRED WILKINSON and *Isaac Gaunt* were both engaged in the business of wool and top merchants at *Bradford*. They were co-executors of the will of one *John Speight*, who had died in 1877. About the 23rd of November, 1878, *Wilkinson* called at *Gaunt's* house and left a message for him, in consequence of which *Gaunt* went to see him the next day. *Wilkinson* then informed *Gaunt* that he was in trouble, for that the manager of his bank had told him that he must reduce the balance of his account or give the bank security, and that he could do neither. He said that he wanted some money, and asked *Gaunt* to buy some wool. *Gaunt* said that he did not want to buy the wool. *Wilkinson* then told him that he had been using some of *Speight's* money for his own purposes, and that he wanted to pay it back, and he confessed to having taken about £2000 of the testator's money. *Gaunt* offered to lend him the money if he would give him security for it, and have nothing to do with the wool. *Wilkinson* said that he had no security to give. Ultimately *Gaunt* consented to buy the wool at a price to be fixed by some *London* brokers, to whom samples were to be sent. The samples were sent to the brokers on the 25th of November. On the same day *Wilkinson* told *Gaunt* that he must have some money the next day with which to set *Speight's* account straight. He said he wanted £2050, and, on the 26th of November, 1870, *Gaunt* gave him that sum in bank notes. *Gaunt* waited while *Wilkinson* went to the bank at which the executors kept an account on behalf of *Speight's* estate, and paid in the £2050 and a further £58 11*s.* to the credit of the executorship account, and when *Wilkinson* returned he gave *Gaunt* the pass-book of the executors, which *Gaunt* took away together with some other books belonging to the estate. The wool was delivered to *Gaunt* shortly afterwards. At one of the interviews with *Wilkinson, Gaunt* told him that he would be liable to be prosecuted if the trust money was not forthcoming when it was required. On the 28th of January, 1879, *Wilkinson* filed a liquidation petition. On the 7th of June, 1880, the trustee in the liquidation applied to the *Bradford* County Court for an order declaring that the payment by the debtor on the 26th of November, 1878, of the sum of £2108 11*s.* to the credit of the trustees of *Speight* was a fraudulent preference, and as such void against the trustee in the liquidation, and directing that the same sum with interest should be repaid by the trustees of *Speight's* estate to the trustee in the liquidation.

The Judge of the County Court (Mr. *Daniel*, Q.C.), on the hearing of this application, made an order to the following effect: that, it appearing that the debtor had previously to the 26th of November, 1878, become indebted to the trust estate of *Speight* in the sum of £2108 11*s.* by means of a breach of trust committed by the debtor, and that *Gaunt*, on being informed thereof by the debtor, at the instance and request of the debtor on the 26th of November, 1878, lent him £2050 in order that he might apply the same without delay towards repayment of the said sum of £2108 11*s.*, and that it was so applied with the privity of *Gaunt*;

and it appearing further that it was at the same time agreed between the debtor and *Gaunt* that the loan should be repaid by the immediate transfer to him as upon sale of certain goods of the debtor of the value of £2050, such goods then forming part of his estate, and that such transfer and sale were made accordingly, the debtor being then insolvent to the knowledge of *Gaunt*, it was declared that the transfer and sale were fraudulent and void as against the trustee in the liquidation, and it was ordered that *Gaunt* should forthwith pay to the trustee the sum of £2050, with interest at 4 per cent. from the 26th of November, 1878 (1).

Gaunt appealed to the Chief Judge. The appeal was heard on the 15th of November, 1880.

De Gex, Q.C., and *West*, for the Appellant:—

There is no evidence of any loan by the debtor to *Gaunt*; hence *Gaunt* was in no sense a creditor, and fraudulent preference cannot exist. The debtor was only a vendor.

Replacing a trust fund is not the same thing as paying an ordinary debt. If there were any creditors the *cestuis que trust* under the will were the creditors.

This was a *bonâ fide* ready money transaction, protected by the concluding paragraph of the 92nd section of the *Bankruptcy Act*, 1869: *Butcher* v. *Stead* (2).

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(1) In the course of his judgment Mr. *Daniel* said: "I have come to the conclusion that this is a clear case of fraudulent preference. *Wilkinson* was not able to pay his debts, and was therefore insolvent within the meaning of the *Bankruptcy Act*; and this communication to *Gaunt* was information to him that he was insolvent. Therefore *Gaunt* must be taken to know that he could not deal with any portion of that estate—that insolvent estate—for the purpose of making an end of a private debt of his own. *Gaunt* says in his affidavit that *Wilkinson* might have been indicted, and his motive for interfering was to save him from indictment. But that motive which *Gaunt* might have had to save *Wilkinson* from a criminal prosecution in respect of a criminal fraud, was not his motive for buying the wool. The motive for buying the wool was to repay himself the £2050 which he by his cheque had lent to *Wilkinson* for the purpose of enabling *Wilkinson* to pay to the trust estate the debt he owed. As soon as that cheque was given, and its proceeds were placed by *Gaunt* in *Wilkinson's* hands, *Gaunt* became a creditor of *Wilkinson* in respect of that advance, which he was entitled to be repaid by *Wilkinson* in common with his other creditors, but not to be repaid by means of assets drawn from the insolvent estate."

(2) Law Rep. 7 H. L. 839.

Winslow, Q.C., and *E. Tindal Atkinson*, for the trustee:—

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The question is, whether this, being a transfer of property made by *Wilkinson* when he was unable to pay his debts, in favour of a trustee for a creditor, was not made with a view of giving that creditor a priority—and whether *Gaunt* was a purchaser in good faith—within the meaning of the 92nd section. Suppose there had been no trust estate, payment of this kind made by *Wilkinson* to a creditor would have been voluntary, and hence a fraudulent preference; even although the creditor did not know that he was a creditor. It is the voluntary act on the part of the debtor which makes the transaction fraudulent: *Ex parte Arnold* (1). That the invoices were fictitious and the sale a sham is clear from the evidence.

Where a trader gave a bill of sale of all the chattels in the hotel where he carried on business, in consideration of a past debt and a present advance, and it was shewn that the present advance was made in order that the debtor might pay another creditor, the bill of sale was held to be a fraudulent preference: *Ex parte Boon* (2). So a sale to an execution creditor made in order to avoid a sale by the sheriff, and thus to escape the effect of subsect. 5 of sect. 6, was held a fraudulent transfer, and void against creditors: *Ex parte Pearson* (3).

[BACON, C.J., referred to *Ex parte Caldecott* (4).]

The meaning of the whole transaction is, that *Wilkinson* comes to *Gaunt* and says, "I want to commit a fraud on the bankrupt law; will you help me?" and *Gaunt* does help him.

The transaction was not a sale and purchase in the regular way of business. The purchaser pays for the goods before dealing; and he pays more than they are worth. It is open to a trustee in bankruptcy to take any objection founded on fraud to a transaction, though it may not amount to a fraudulent preference in the precise terms of the statute. Here the trustee follows the money to its destination in recouping the trust fund, and shews that this was done with *Gaunt's* knowledge. It is clear that *Wilkinson* was insolvent at the time. The bank had refused him further credit. He confessed he had no money and no security;

(1) 3 Ch. D. 70, 77.
(2) 41 L. T. (N.S.) 42.
(3) Law Rep. 8 Ch. 667.
(4) 4 Ch. D. 150.

and *Gaunt's* conduct in allowing himself to be persuaded, after refusing at first, to advance the money, shews his knowledge of *Wilkinson's* insolvent condition. Had the transaction been carried out by means of a bill of sale, the trustee could have impeached it; he is equally entitled to set aside this contrivance.

De Gex, in reply:—

The Respondent is driven to argue that a man who buys goods and pays for them is bound to see what the vendor does with the purchase-money. *Gaunt* swears he knew of no other debt than this. To make *Gaunt* pay this money twice over would be a monstrous hardship.

BACON, C.J.:—

These cases of fraudulent preference are amongst the most difficult which arise in the administration of the law of bankruptcy, but whatever doubt there may have been upon the subject formerly, there is no question now that any right which a trustee in bankruptcy can have against a preferred creditor must depend upon the statute. The statute declares that every transfer of property, every payment made or obligation incurred by a person unable to pay his debts, within three months before bankruptcy, in favour of a creditor, or of any person as trustee for a creditor, shall be deemed fraudulent and void as against the trustee in the bankruptcy; but that is carefully guarded by the provision at the end, that "this section shall not affect the rights of a purchaser, payee, or incumbrancer in good faith and for valuable consideration." There are many cases of this kind. One was a case before Lord *Mansfield*, where Mr. *Fordyce*, in contemplation of an act of bankruptcy, inclosed to one of his creditors two cheques for a debt he owed him, in a letter in which he said, "He has the honour to shew him that preference which he conceives certainly is his due": *Harman* v. *Fisher* (1). That was a question between a debtor and one of his creditors. But the relation of debtor and creditor never subsisted between this Appellant and the debtor. The debtor comes to the Appellant and says: "I am in a great strait; I have used money which I ought not to have used; my bankers require further security from me which I cannot give them. Although I have abundant money and a large surplus beyond satisfying all my creditors, I want money immediately, and I want you to buy from me a certain quantity of wool." The whole transaction between these two persons is that of buying and selling wool. There is nothing whatever else between them. The wool is described. The purchaser takes the vendor's word for the quality of it. The price is regulated at such a price as is reasonable on a forced sale. There is a small reduction from the invoiced price, the vendor taking upon himself all the charges that he had been put to. The price is fixed as the value of the wool, not as a sum of money to be lent by the Appellant to the debtor, but as a sum of money paid to him for the wool which was then sold and delivered, and part was delivered before the money was paid. It is the most ordinary transaction of purchase and sale that can be described, unless it comes within the provision of the bankruptcy statute or the policy of the bankrupt law. The owner of the wool has a right to do what he likes with it; he may sell it or pawn it whenever he likes, and of the proceeds he may make whatever application he thinks fit. What has the purchaser to do with it? It is said that the purchaser knew the vendor was going to apply it in preferring some other demand. The purchaser had no claim upon the vendor for it. The vendor told him, "I have been tempted to take other people's money, and I want to pay it back again." How can that affect the purchaser's right? If the vendor had gone to a pawnbroker and said, "Here is some wool, lend me so much money upon it," would the pawnbroker have been expected to know what he was going to do with the money or be affected by any statement as to what he was going to do with the money? The Appellant had no control over the vendor, and whether the vendor might be tempted again to apply the purchase-money in some other way he could not tell. He paid the money down for goods sold and delivered to him. It is then said that it is a fraudulent transfer under the 6th section. If I could find, as the learned County Court Judge seems to have thought, that the purchaser's motive for buying the wool was to repay to the trust estate the debt which the vendor owed, I might be disposed to deal with the case on other grounds. It is impossible to say that there was any transaction of loan on the Appellant's part. A cheque was given which was converted into bank-notes and paid into the hands of the vendor, and by the same transaction which made the vendor the owner of £2050 in bank-notes, the purchaser became the owner of the wool. What was done with it after cannot affect the transaction at all. I called the attention of counsel to the case of *Ex parte Caldecott* (1), which, in my opinion, covers this case, and a great deal more than covers it. In that case, the object of the debtor being to shelter himself and escape the consequence of a forgery which he had committed, he gave to the man upon whom he had forged, a security for £100 which he owed him before, and £100 then to be advanced in order to take up the forged bill. In form that seemed to be a somewhat nefarious transaction. I was of opinion that it was against public policy to admit the claim under such circumstances. I thought the transaction between these parties was invalid, and so I decided, but I decided erroneously, as I must now say, because the Court of Appeal held that I was erroneous in that view. The judgment of Lord Justice *James* (2), who spoke for the rest of the Court, is this: "If there was a legal misdemeanour, the bankrupt was a party to it. *In pari delicto potior est conditio possidentis aut defendentis.* The bankrupt could not have recovered back the proceeds of the sale of the goods, and his trustee cannot be in a better position than the bankrupt." The accuracy of that proposition cannot be questioned. In this case what step could *Wilkinson* have taken as between himself and *Gaunt* at any subsequent time if he (*Wilkinson*) had not become a liquidation debtor? The trustee cannot be in any better position than the debtor unless he can shew either that the transaction comes within the enactment of the statute or that the conduct of the parties to the transaction has been such as to defeat and delay creditors. Although the facts of *Ex parte Caldecott* differ in important particulars from the case now before me, the principles of law there acted upon govern the present case. Finding, as I do, that the fact upon which the learned Judge, for whom I entertain the most sincere respect, proceeded, namely, that there was a loan between these parties, is unsupported by the evidence; finding, moreover, that there was a

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(1) 1 Cowp. 117.

(1) 4 Ch. D. 150.

(2) 4 Ch. D. 156.

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positive purchase and sale—a delivery of chattels and payments of the price of those chattels—I think that there is nothing to be complained of in the transaction. That the debtor, when in possession of the money which he had got by the sale of the goods chose to apply it in a way which, as far as concerns the creditors, was an unjust way of dealing with it, cannot affect the purchaser of the goods in the slightest degree. In my opinion it is neither a fraudulent preference nor a fraudulent transfer under the 6th section, nor is it a transaction between these parties which is in any way a fraud upon the bankrupt law. I think, therefore, that the order of the County Court must be discharged.

C. A.

From this decision the trustee appealed. The appeal was heard on the 17th of March, 1881.

A. Wills, Q.C., and *E. Tindal Atkinson,* for the Appellant:—

The sale of the wool was a fraudulent transfer of property within the meaning of sub-sect. 2 of sect. 6 of the *Bankruptcy Act,* 1869, and therefore an act of bankruptcy, and it was also a fraudulent preference.

[JAMES, L.J.:—How was it a fraudulent preference?]

Gaunt was liable to make good to the trust estate the amount of the defalcations of *Wilkinson,* and therefore he was a creditor of *Wilkinson* for the amount.

[BRETT, L.J.:—Was he a creditor until he had paid the amount?]

Such a liability could be proved as a debt under sect. 31. At any rate, sect. 6, sub-sect. 2, applies. The transfer of the goods was made for the express purpose of defeating an equal distribution of them in bankruptcy.

[BRETT, L.J.:—Must you not shew that there was fraud on both sides? Is it enough that the debtor had a fraudulent intention?]

A fraudulent intention in the mind of the debtor is enough.

[JAMES, L.J.:—Suppose he had said to his co-trustee, I want to make good what I owe to the trust estate. If I do not, you may be liable to make it good, and I may be liable to a criminal prosecution. Would a sale of goods to the co-trustee in order to

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raise money to make good the breach of trust be a fraudulent transfer?]

It would if with the knowledge of both parties the purchase-money was to be employed in preferring the trust estate.

[JAMES, L.J.:—Suppose *A.* sells goods to *B.* with the intention (known to *B.*) that the purchase-money shall be employed in preferring *C.* Has such a transaction ever been held to be a fraudulent transfer?]

In principle it must be so; both parties would be conspiring to provide a fund to be used for the purpose of defeating the bankrupt law. If *Wilkinson* could have made good the breach of trust by handing over the wool to the trust account, he would have done so. What he actually did was in effect the same thing.

[BRETT, L.J.:—Does not sub-sect. 2 of sect. 6 point at a conveyance or transfer which, as between the parties to it, passes nothing?]

It includes more than that; it extends to a transaction the object of which is to prevent the equal distribution of the debtor's property in bankruptcy.

[JAMES, L.J.:—A payment made to a creditor under pressure has that object.

BRETT, L.J.:—Has a sale and purchase of goods when money is actually paid ever been set aside?]

In *Ex parte Boon* (1) a sale of goods was set aside.

[JAMES, L.J.:—The real point of that decision was, that the goods were transferred as a security for a past debt.]

The mere dread on the part of *Wilkinson* of a criminal prosecution would not support the transaction: *Ex parte Hibernian Joint Stock Banking Company* (2); *Thompson* v. *Freeman* (3). The transaction cannot be separated into parts, it must be looked at as a whole. It was clearly a mere piece of machinery for a preference of a debt for which *Gaunt* and *Wilkinson* were jointly liable. At any rate, the payment of the money to the trust account was a voluntary preference of the trust estate. If the transaction can stand, *cestuis que trust* can always obtain a pre-

(1) 41 L. T. (N.S.) 42.
(2) 14 Ir. Ch. Rep. 113.
(3) 1 T. R. 155.

ference when their trustee has committed a breach of trust and is insolvent.

Winslow, Q.C., and *West*, for *Gaunt*, were not heard.

March 24. JAMES, L.J.:—

The facts of the case are few and not in dispute.

The debtor applied to the Appellant and offered to sell him a large quantity of goods, amounting in value to £2050. The Appellant was reluctant to buy them, but to induce him to make the purchase the debtor communicated to him that he was in great difficulties, as he appears in fact to have been, his bankers having refused him any further credit, and also that he had misappropriated trust moneys belonging to a trust estate of which he and the Appellant were trustees, and he told him in effect that he wanted to sell the goods in order to raise money to make good that defalcation. Thereupon the Appellant was minded to make the purchase, and he agreed to make it at a price to be fixed by means of samples which were to be sent to a *London* broker, who was to fix the proper trade price for them. This being agreed to, the money was paid to the debtor, who, with the knowledge of the purchaser, immediately went to a bank in which there was a joint trust account in the names of the trustees, and paid the purchase-money to the trust account, so as to make good his defalcation. The goods were delivered in pursuance of the contract. The particular goods, the subject-matter of the contract at that time, did not, as it turned out, amount in value to the purchase-money paid, but an additional quantity was subsequently added to make up the value. After the bankruptcy, which did not take place until two months after this transaction, the trustee, having investigated the matter, applied to the County Court for an order directed against the trust estate, that is, against both the trustees as representing the trust estate, to restore the money which had been so paid to the bankers to the trust account. Upon the hearing before the County Court Judge he was not persuaded to accede to the application in the form in which it was made; he declined to make any order against the trust estate as such, but he found his way to make an order against one of the two trustees, that is, against Mr. *Gaunt* the purchaser, on the ground of a voluntary preference. He worked it out in this way—he considered that the £2050, which was paid under the circumstances which I have mentioned, was a loan from the one trustee to the other to enable him to make good the defalcation, and that then the goods were delivered by way of voluntary preference in satisfaction of the debt which had been so created. The Chief Judge was of opinion that this view of the transaction could not be sustained, that, whether it could or could not be impeached upon other grounds, it would be impossible to convert that, which was really a payment in respect of goods to be delivered, into a loan, and then to treat the delivery of the goods as a payment or satisfaction of that loan. In that view I entirely concur. It is impossible, as it seems to me, that the transaction can be converted from that which it was into something which it was not, in order to bring in the doctrine of voluntary preference. And in truth that view of the case was abandoned upon the argument of the appeal before us; it was admitted by the Appellant's counsel that they could not sustain it. But it was pressed upon us that the order of the County Court Judge could be sustained on the ground that the sale was itself a fraudulent transfer, that is, that the transfer of goods to a purchaser for value with the view of using the purchase-money for a voluntary preference, the purchaser knowing this intention, was a fraudulent conveyance or transfer within the meaning of the 6th section of the Act. It appears to me that that view cannot be sustained. In truth, a mere voluntary transfer, impeachable only on the ground that it is a preference of a particular creditor, has never been held to be in itself a fraud, or an act of bankruptcy. It may be impeached on the ground that it is voluntary, but it is impossible, as it appears to me, to hold that a mere voluntary transfer is of itself an act of fraud. And, if that is not fraudulent within any principle of law, it would be equally impossible to say that a sale becomes fraudulent because there is an intention in the mind of the vendor to use the purchase-money for the purpose of making a voluntary preference, and the purchaser knows that that is the motive of the sale and the intention of the vendor with respect to the proceeds of the sale. It appears to me that it would be an extravagant extension of the doctrine of fraud on the bankruptcy law to hold that such a sale under such circumstances is of itself a fraudulent act or an act of bankruptcy.

It was then contended that the Appellant might fall back on the original form of the application to the County Court Judge, for an order against the trust estate as such to restore the money which had been paid to the credit of the two trustees in the banking account of the trust estate, on the ground that that payment was a voluntary preference of the trust estate. It appears to me that that view also cannot be sustained. In truth the County Court Judge declined to accept it, and he must be considered to have dismissed the application so far as it was based upon any such view, and there has been no appeal from his decision in respect of that, and we have not really before us now any persons representing the trust estate. This might be sufficient to dispose of the application in that point of view. But I am of opinion that the County Court Judge was right, and that it is impossible to bring such a transaction within the doctrine of voluntary preference of a creditor. In order to do that there must be a payment or a transfer of goods by a debtor to a creditor or to somebody in trust for a creditor. Here the creditor was the trust estate, if it could be called a creditor at all. If a debtor on the eve of insolvency, and just before he becomes bankrupt, sells goods in order that he may restore money which he has stolen from his master or from anybody else, and does restore the money, it seems to me impossible to hold that such a payment can be treated as a fraudulent preference of a creditor.

BRETT and COTTON, L.JJ., concurred.

JAMES, L.J.:—

The appeal will be dismissed with costs.

Solicitor for Appellant: *S. S. Seal*, agent for *Rawson, George, & Wade, Bradford.*

Solicitors for Respondent: *W. & J. Flower & Nussey*, agents for *Killick, Hutton, & Vint, Bradford.*

W. L. C.

C. A.

1881
C. J. B.
Jan. 31.
C. A.
March 24.

21 ChD 87

Ex parte WICKS. *In re* WICKS.

Bankruptcy—Attaching " Salary or Income " of Bankrupt—Voluntary Allowance—Bankruptcy Act, 1869 (32 *&* 33 *Vict. c.* 71), *s.* 90.

A purely voluntary allowance made to a bankrupt is not "income" within the meaning of sect. 90 of the *Bankruptcy Act*, 1869, and no order can be made for the payment of any part of such an allowance, when received by the bankrupt, to the trustee in the bankruptcy.

In order that sect. 90 may apply, the payment must be one to which the bankrupt has a legal or equitable claim.

Decision of *Bacon*, C.J., reversed.

On the 29th of December, 1880, the trustees in the liquidation of *John Wicks*, a retired publican, applied to the *Kingston* County Court for a charging order upon a sum of £200 per annum, which was voluntarily allowed to the debtor by a person whose name was mentioned, or so much thereof as to the Court should seem proper. The person who made the allowance was examined, and he stated that he made it voluntarily, and that the debtor had no legal claim upon him for it. The payment of the allowance commenced from the 1st of March, 1880; the debtor's petition was filed on the 16th of March, 1880. The debtor himself admitted that he had no legal claim on the person who made the allowance. The Judge refused the application of the trustees, on the ground that, the allowance, being a purely voluntary one, sect. 90 of the *Bankruptcy Act*, 1869, did not apply. The trustees appealed to the Chief Judge.

The appeal was heard on the 31st of January, 1881.

Horton Smith, Q.C., and *E. C. Willoughby*, for the Appellants:—

Sect. 90 of the *Bankruptcy Act*, 1869, applies (1). This allowance is income, so long as it is paid; and, if and when it shall cease to

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(1) Sect. 88 provides that, "where a bankrupt is a beneficed clergyman, the trustee may apply for a sequestration of the profits of the benefice."

Sect. 89. "Where a bankrupt is or has been, an officer of the army or navy, or an officer or clerk, or otherwise employed or engaged in the Civil Service of the Crown, or is in the enjoyment of any pension or compensation granted by the Treasury, the trustee during the bankruptcy, and the Registrar after the close of the bankruptcy, shall receive for distribution amongst be paid, the bankrupt will suffer no injury by the order asked for, for under the 182nd rule he may apply to the Court to rescind the order, or reduce the amount.

Winslow, Q.C., and *Herbert Reed*, for the bankrupt:—

This allowance is simply voluntary, and the donor has declared that if the order be made, the allowance will be discontinued. How then can the Court act? There is nothing upon which the order can operate. Does the trustee pretend that he will venture to sue the donor? If not, how can this be "property" within the 4th section? Neither is it a "salary or income," within the 90th section. If this be within the 90th section, then every gratuity which a bankrupt's father or mother or other relative may bestow upon him will be "income." A condition annexed to the gift, or an arrangement for its being paid periodically, can make no difference. Before sect. 90 can apply, it must be proved that the bankrupt "is in the receipt of" an "income." A voluntary allowance is not an "income."

BACON, C.J.:—

In deciding this case, I must be governed by the provisions of the statute, and as to the meaning of those provisions I cannot entertain a doubt. That this allowance is an income, when and so long as it is received, nobody can dispute. It answers all that can be signified by the word "income." No doubt it is voluntary and may be withdrawn; but until it is withdrawn it is "income" of which the bankrupt is "in receipt," within the language of the 90th section.

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the creditors so much of the bankrupt's pay, half-pay, salary, emolument, or pension, as the Court, upon the application of the trustee, thinks just and reasonable, to be paid in such manner and at such times as the Court, with the consent in writing of the Chief Officer of the department under which the pay, half-pay, salary, emolument, pension, or compensation is enjoyed, directs."

Sect. 90. "Where a bankrupt is in the receipt of a salary or income other than as aforesaid, the Court, upon the application of the trustee, shall, from time to time, make such order as it thinks just for the payment of such salary or income, or of any part thereof, to the trustee, during the bankruptcy, and to the Registrar, if necessary, after the close of the bankruptcy, to be applied by him in such manner as the Court may direct."

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Ex parte WICKS.
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The object of the section is to provide that all a bankrupt's property shall be made available for the payment of his debts; and then the Legislature has said that the provision shall be applicable to the extent to which the Court shall think just. It may order the whole to be paid to the trustee, or only a part. I have no need, therefore, to consider minutely the 4th section; I have only to deal with the 90th section, which provides that "income" of whatever kind shall be available for the payment of the bankrupt's debts. Whenever the bankrupt is in receipt of income, it is incumbent on the Court to consider what justice requires; whether the income has been or will be withdrawn is a matter I do not desire to consider, for if it be withdrawn, then the order will simply become inoperative.

I think an order must be made, and the only question is to what amount.

Horton Smith, Q.C., read an affidavit as to the state of the bankrupt's family.

BACON, C.J.:—

I order that £50 out of every £200 received by the bankrupt be paid by him to the trustee.

C. A.

From this decision the bankrupt appealed. The appeal was heard on the 24th of March.

Winslow, Q.C., and *Herbert Reed*, for the Appellant:—

A purely voluntary allowance such as this is not within sect. 90.

[They were stopped by the Court.]

Horton Smith, Q.C., and *E. C. Willoughby*, for the trustees:—

The allowance is either property or income of the bankrupt. If it is the former, it vests in the trustee on his appointment; if it is the latter, sect. 90 applies. The definition of the word "property" in sect. 4 is large enough to include it. But at any rate it is "income" within sect. 90. "Income" is something which accrues, or comes in from time to time. Such an allowance would be chargeable with income tax under 16 & 17 Vict. c. 34,

s. 1. Of course the Court would always allow a fair margin for the maintenance of the bankrupt.

JAMES, L.J.:—

I am unable to agree with the decision of the Chief Judge. I cannot conceive that a voluntary allowance made by a father, a relative, or a friend to a bankrupt, a perfectly voluntary allowance, can be made the subject of such an order by the Court of Bankruptcy under the words "salary or income." It seems to me that the words mean a salary or an income to which the bankrupt is legally or equitably entitled, and not a mere voluntary payment.

BRETT, L.J.:—

I think we have no right to reduce an Act of Parliament to a wicked absurdity.

COTTON, L.J.:—

Sect. 89 applies to salary or income received by a bankrupt in respect of services rendered by him in various ways—income to which the bankrupt has a legal claim. Then comes sect. 90 to sweep in any other kind of salary or income; and in my opinion it was intended to apply to something of a similar character, which is not included in the previous section. When it speaks of the bankrupt being "in receipt of an income," it does not mean something which he receives by the bounty of another person, but something which he has a right to receive. When there is a mere voluntary payment made from time to time, in my opinion it does not matter whether the bankrupt is in the receipt of it at the time of the bankruptcy, or whether the allowance is made to him after his bankruptcy for his maintenance. Could it be contended that an allowance voluntarily made to him for his maintenance after the commencement of his bankruptcy could be attached under sect. 90? Such a construction would be absurd, and, in my opinion, it makes no difference that the voluntary payment was made before the bankruptcy and is continued after it.

Solicitors for Bankrupt: *Wills & Watts.*
Solicitor for Trustees: *T. D. Dutton.*

W. L. C.

C. A.
1881
April 7.

Ex parte SEAR. *In re* PRICE.

Secured Creditor — Attachment — Tolzey Court of Bristol — Bankruptcy Act, 1869 (32 *&* 33 *Vict. c.* 71), *s.* 16, *sub-s.* 5.

An attachment of the goods of the defendant in an action of debt in the Tolzey Court of *Bristol* is only a process to compel the appearance of the defendant, and does not make the plaintiff a secured creditor within the meaning of sect. 16, sub-sect. 5, of the *Bankruptcy Act*, 1869.

The effect of an attachment in the Tolzey Court is the same as that of a foreign attachment under the custom of the Mayor's Court of *London*.

Levy v. *Lovell* (1) followed.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

E. T. Price carried on business as a stay manufacturer at *Bristol* and in *London*. On the 20th of December, 1880, a bankruptcy petition was presented against him in the *London* Bankruptcy Court, founded on an act of bankruptcy committed by him on the 10th of December, and on the 1st of January, 1881, he was adjudicated a bankrupt.

On the 20th of December, 1880, an action had been commenced against him in the Tolzey Court of *Bristol* by *Ralph Hall & Co.* for £49. He was not to be found within the jurisdiction of the Court, and on the same day a warrant was issued to the officers of the Court commanding them "to attach *Price* by his goods and chattels so that he be at the next Court after the attachment to be held" to answer the plea of *Hall & Co.* Under this warrant the officer of the Court, on the 22nd of December, seized certain goods of *Price*. The trustee in the bankruptcy applied to the Court for an order declaring that the goods which had been seized were the property of the trustee. The Registrar dismissed the application with costs, on the ground that by the attachment the Plaintiffs had obtained security for their debt, and that they had done so without notice of the act of bankruptcy. The trustee appealed.

Winslow, Q.C., and *L. H. Rosenthal*, for the Appellant:—

The effect of the attachment is the same as that of a foreign

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(1) 14 Ch. D. 234.

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attachment by the custom of the City of *London*, which it has been decided does not give the creditor who has served the attachment a security on the property of the debtor: *Levy* v. *Lovell* (1). Moreover, the attachment was after the act of bankruptcy.

[JAMES, L.J., referred to *London Joint Stock Bank* v. *Corporation of London* (2), in which the House of Lords held that an attachment under the custom of *London* is only for the purpose of compelling the appearance of the defendant.]

Northmore Lawrence, for the creditor:—

There is a substantial distinction between an attachment under the custom of *London* and an attachment in the Tolzey Court. In the Mayor's Court of *London* the attachment can be got rid of by bail being given for the appearance of the defendant; the evidence shews that in the Tolzey Court the bail must make themselves responsible for the debt claimed in the action. The creditor had no notice of the act of bankruptcy till after the attachment, and therefore he is protected by sect. 95 of the *Bankruptcy Act*, 1869: *Ex parte Schulte* (3).

JAMES L.J.:—

I think it is impossible to distinguish the case from *Levy* v. *Lovell*. The process of attachment is intended to enforce the appearance of the defendant. It is impossible to consider the attachment as a security for a debt which may never be proved.

BRETT, L.J.:—

I think the custom is really the same as that of the City of *London*. The book which has been produced to us from the Registrar's office describes the custom in the same terms exactly as those in which the custom of *London* has been described. That being so, the case is governed by *Levy* v. *Lovell*.

COTTON, L.J.:—

I think we must hold upon the evidence that the process of

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(1) 14 Ch. D. 234.

(2) 5 C. P. D. 494.

(3) Law Rep. 9 Ch. 409.

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attachment in the Tolzey Court is the same as that in the Mayor's Court of *London.* The case is, therefore, governed by *Levy* v. *Lovell* (1).

Solicitor for Trustee: *A. E. Rosenthal.*

Solicitors for Creditor: *Gregory, Rowcliffes, & Rawle,* agents for *Gerard Mosely, Bristol.*

W. L. C.

C. A.
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M. R.
April 8, 13.
C. A.
Dec. 20, 21.

22 Ch D 353
363-7, 8
370-8, 382
23 Ch D 572
— 547.

In re DRONFIELD SILKSTONE COAL COMPANY.

Limited Company—Power to Company to purchase its own Shares—Reduction of Capital—Companies Act, 1862, *ss.* 12, 23—*Companies Act,* 1867, *s.* 9.

The memorandum of association of a limited colliery company gave the company power to do all things which it should consider conducive to the attainment of its objects, but did not in terms give any power to purchase its own shares. The 10th clause of the articles empowered the directors to purchase for the company any shares in the company, and directed that the shares so purchased should be dealt with as if they had never been issued, and that any profit arising on the re-issuing or subsequent sale of such shares should be deemed profits of the year in which they were re-issued or sold. In 1872, disputes having arisen as to the conduct of the business, the directors agreed with *W.*, the largest shareholder, who was also one of the directors, to purchase for the company his shares and also his interest as landlord of the mines worked by the company. This arrangement was confirmed by an extraordinary general meeting of the company, and was carried into effect by an assignment of his interest in the mines to the company for a specific sum, and by a transfer to the company of his shares for another specific sum. The company was entered in the share register as holder of these shares, and in all the subsequent returns to the Registrar of Joint Stock Companies the company was entered as such holder. The company for some time was prosperous, but afterwards fell into difficulties, and in 1879 an order was made for winding it up:—

Held, by *Jessel*, M.R., that the power to the company to purchase its own shares was illegal, and that *W.* must be placed on the list of contributories.

Held, on appeal, that although the articles could not effectually authorize a general trafficking in shares, as that would be extending the business of the company in a way not authorized by the memorandum, there was nothing illegal in a clause authorizing a purchase of shares, not for profit, but for carrying into effect an arrangement considered to be for the benefit of the company; that such a purchase did not reduce the capital of the company in any sense in which such reduction is prohibited by the Companies Acts; and that *W.* had effectually surrendered his shares to the company and ceased to be a shareholder from the date of the surrender, and was not a contributory:

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(1) 14 Ch. D. 234.

Held, further, that if the transaction, supposing it to have been carried into effect without the sanction of the extraordinary general meeting, would have been questionable, the company having confirmed it and taken the benefit of it, could not now have impeached it, and that the liquidator had no better right.

THE *Dronfield Silkstone Coal Company* was formed in 1867 as a limited company, with a nominal capital of £40,000, in 1600 shares of £25 each. Its objects, as stated in the memorandum of association, were (amongst other things), to take over a colliery business formerly carried on by *Frederick Ward* and *James Addy* in co-partnership, and "the carrying on of the trades or businesses of coal miners," &c. 500 shares were allotted to *Ward*, and a like number to *Addy*, and *Ward* afterwards acquired forty-nine other shares, making his total holding 549. *Ward* and *Addy* sublet their beds of coal to the company, reserving a profit rent. All the shares were allotted.

The memorandum of association did not contain any clause specifically referring to a purchase by the company of its own shares, but the 12th sub-section of clause 3 authorized "the doing of all things whatsoever which the company shall consider to be in any way connected with the trades, businesses, or purposes aforesaid, or any of them, or otherwise conducive to the attainment of the above objects, or any of them." The 10th clause of the articles of association was as follows:—

"The directors may from time to time purchase for the company any shares in the company, at such price as the directors think reasonable, and may postpone the issue of any shares in the company, whether original shares or shares to be hereafter created, for such time, and from time to time as the directors think fit. Shares so purchased may from time to time, and at any time or times, be by the directors dealt with in the same way as if they had never been before issued. And this article, so far as it relates to the purchase of shares and subsequent dealing therewith, shall apply as well to forfeited shares as to shares not forfeited. The purchase-money payable by the company for any shares so purchased may be paid out of any assets of the company, and such shares may be transferred to the company or to such person or persons as the directors shall determine. Any profit arising on the re-issuing or subsequent sale of any shares purchased for the company shall be considered as profits of the year in which such shares shall be re-issued or sold for the company. Any person to whom any shares purchased for the company shall be transferred as a trustee for or on behalf of the company shall be indemnified and held harmless by the company against all claims and demands arising by the use of his name as such trustee."

Ward, Addy, and *W. Wake*, were the first and only directors of the company till June, 1871, when *W. Batt* was added as a director.

Serious disputes as to the mode of conducting the company's business having arisen between *Ward* and the company, and more particularly between *Ward* and *Addy*, the directors came to the conclusion that it would be for the benefit of the company to buy *Ward's* shares, and also to buy the interest of *Ward* and *Addy* in the beds of coal, and accordingly, with a view to that arrangement, the directors, in September, 1871, made an offer to purchase *Ward's* shares at £10 10*s.* per share.

This offer *Ward* declined, but shortly afterwards he made overtures to his co-directors to sell them all his shares in the company, and also all his coal interests under the leases of the colliery, with a view to severing his connection with the company.

Much discussion then took place as to the terms of the purchase of *Ward's* shares, and also as to the terms upon which the coal interests of *Ward* and *Addy* were to be purchased. Ultimately, however, terms were agreed upon which the directors resolved to submit to an extraordinary general meeting of the shareholders. At this time £12 10*s.* per share had been called up.

The extraordinary general meeting was held on the 25th of March, 1872, and was attended by nine shareholders holding in all 1589 out of the 1600 shares. The report of the directors laid before this meeting stated that it was called for the purpose of considering, and, if so determined upon, adopting and authorizing the carrying out of certain arrangements which, subject to the approval of the shareholders, the directors had made with *Addy* and

Ward respectively. That the arrangement with *Ward* was that the company should purchase from him for £10,000 his shares in the company, and his interest as a lessee in the various leases granted to him and *Addy* of the premises subsequently sublet by them to the company. That the arrangement with *Addy* was that the company should purchase for £5000 his interest under the leases granted to him and *Ward* as before mentioned. That the purchase-moneys should be considered as payable on the 25th of March, 1872. That *Ward* should lend the company £8000 to be secured by a mortgage, and by the acceptances of the company to bills of exchange drawn by him on the company for that sum and interest at £5 per cent. per annum, the £8000 being repayable by four equal annual instalments, and the interest by half-yearly payments. That *Addy* should lend the company £4000 on the same terms. That the security to be granted to *Ward* was not merely to be the acceptances and the mortgage, but in such mortgage there was to be contained a provision making the acceptances to be given to him a primary charge (subject to an existing charge of £5000 to other parties) upon so much of the capital as was not yet called up, and there was to be a similar charge to *Addy* in respect of his acceptances, but *Ward's* charge to have priority over *Addy's*. That deeds to carry out the provisional arrangement had been prepared, and would be laid before the meeting.

The nine shareholders present at the meeting passed and signed resolutions that the report be approved, adopted, entered on the company's minutes and carried out; and that the directors of the company were authorized to affix the company's seal to and to perfect and carry out the several indentures and documents thereinafter mentioned (here followed a list of six instruments which had been prepared for effectuating the arrangement, including the two indentures hereafter mentioned). That the company should give the various acceptances referred to in the report, and that the directors were thereby authorized to do all acts necessary or advisable, or which by the board for the time being should be deemed to be necessary or advisable for carrying out the several arrangements before referred to.

Ward accordingly, by indenture of the 25th of March, 1872,

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made between himself of the one part and the company of the other part, in consideration of the sum of £5000 therein expressed to be paid to him by the company, transferred his 549 shares to the company; and by another indenture of the same date *Ward* and *Addy*, in consideration of £10,000 therein expressed to be paid to them by the company, assigned to the company their interests in the leaseholds. All the other documents were executed, and the arrangement was fully carried into effect.

The transfer of *Ward's* shares to the company was duly registered in the books of the company shortly after its execution, and from that time the company were entered in the share register as owners of the 549 shares, and were returned as the owners of them in all the subsequent returns filed with the Registrar of Joint Stock Companies.

In 1872, 1873, and 1874, the company was very prosperous, and paid large dividends, but subsequently fell into difficulties, and in 1879 an order was made for winding it up. The liquidators included the name of *Ward* in the list of contributories, whereupon *Ward* applied to have it removed.

The motion was heard before the Master of the Rolls on the 3rd of April, 1880.

Davey, Q.C., and *Curtis Price*, for *Ward*, contended that he was discharged from all liability as a contributory, inasmuch as he had *bonâ fide* parted with all his shares to the company, as he was authorized to do by the memorandum and articles of association when read together, the transaction being clearly for the benefit of the company; also that the transaction, even if *ultrà vires*, could not be annulled at this distance of time. They cited *Marshall* v. *Glamorgan Iron and Coal Company* (1); *Harrison* v. *Mexican Railway Company* (2); *Wright's Case* (3); *Teasdale's Case* (4); *Colville's Case* (5); *London, Hamburgh, and Continental Exchange Bank* v. *Henry* (6).

Chitty, Q.C., and *Burton Buckley*, for the liquidator, contended that the transaction was *ultrà vires*, as being a purchase by the

(1) Law Rep. 7 Eq. 129.
(2) Ibid. 19 Eq. 358.
(3) Ibid. 12 Eq. 331.
(4) Law Rep. 9 Ch. 54.
(5) 48 L. J. (Ch.) 633.
(6) Law Rep. 7 Eq. 334.

company of its own shares; and cited *Cree* v. *Somervail* (1); *Ashbury Railway Carriage and Iron Company* v. *Riche* (2); *Hall's Case* (3); *Hope* v. *International Financial Society* (4); *Teasdale's Case* (5); *Zulueta's Claim* (6); *Lawe's Case* (7); *In re National Funds Assurance Company* (8); *Stanhope's Case* (9); *Spackman* v. *Evans* (10).

JESSEL, M.R.:—

Whatever view may ultimately be taken of the law on this subject, I feel that there can be but one conclusion as to the great hardship of the case on Mr. *Ward*, for he entered into this transaction clearly with the view of *bonâ fide* getting rid of his shares and all his interest in the company: but I am bound to decide the question according to my view of the law, and it does appear to me that there are insuperable difficulties in the way of holding that this transaction is valid.

The first question to be decided is whether the transaction is covered by the memorandum of association. It has been ingeniously argued by Mr. *Price* that it was, and that it was, in fact, a sale of the shares, and of certain interests in the leases of the colliery. The proposals I see originally were separate; that is to say, the company originally offered to purchase Mr. *Ward's* shares at ten guineas per share; but ultimately there was another arrangement. Mr. *Ward* said, "I want to get out of the company altogether, and I will sell you all my shares and the whole of my interest under the leases:" and that was the way in which Mr. *Ward's* proposal was finally accepted by the company. A similar proposal was made for the purchase from Mr. *Addy* of his interest under the leases. When we come to look at the resolutions to see what the company really did, there is no doubt that the resolutions severed the transfer of the shares from the contemporary arrangement. The company at its meeting and by its resolutions sanctioned each separate thing, the transfer of the shares being sanctioned separately at so much money. I do not, however, place much reliance upon that, because, if this were a transaction valid in law, I think a Court of Equity would treat the whole arrangement, however formally separated, as forming together a single transaction. But in fact and in law, they were treated as separate things. The transfer was assented to as a transfer for so much money, and is so carried out, and the company is actually entered on the register as the holder of its own shares. As regards the memorandum, although, in addition to "the carrying on of the trades or businesses," there are the words "the doing of all other things whatsoever which the company shall consider to be in any way connected with the trades, businesses, or purposes aforesaid, or any of them, or otherwise conducive to the attainment of the above objects, or any of them," those words do not, in my opinion, include a general power for the company to traffic in their own shares. Whatever the words may include, they do not, in my opinion, amount to that; and therefore I think I may lay aside at once the consideration of the memorandum of association except so far as to say that it does not authorize a general trafficking in shares.

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(1) 4 App. Cas. 648.
(2) Law Rep. 7 H. L. 653, 685.
(3) Ibid. 5 Ch. 707.
(4) 4 Ch. D. 327.
(5) Law Rep. 9 Ch. 54.
(6) Law Rep. 5 Ch. 444.
(7) 1 D. M. & G. 421.
(8) 10 Ch. D. 118.
(9) Law Rep. 1 Ch. 161.
(10) Ibid. 3 H. L. 171.

I now come to the articles; and, in my opinion, the articles do authorize a general trafficking in shares. The 10th article is as large in terms as it can very well be: it is not limited in any way. It says this:—[His Lordship then read the article, and continued:—]

The article is as general as possible; it contemplates dealing with the shares for a profit, and shews that the profits are to be treated as the profits of the year. It is, in my opinion, an authority, if valid, authorizing general trafficking in the shares of the company by buying and selling with a view to profit, and is not merely an ancillary power for the purpose of the internal regulation of the company: it is a substantial authority to deal in the shares of the company.

Well, then, if that is so, it is a mere question of construction, upon which I have arrived at a very decided conclusion, namely, that this article is inconsistent with the memorandum of association. I need not read what Lord *Cairns* said in *Ashbury Railway*

Carriage and Iron Company v. *Riche* (1), because, I agree with Mr. *Davey*, it is old law; but Lord *Cairns* does say in the strongest terms that if the articles attempt to extend the business of a company beyond what is stated in its memorandum, the articles are to that extent void.

That being so, the result in the present case is that this portion of the articles which goes beyond the memorandum is not valid, and does not authorize the company to purchase its own shares.

I now come to a minor point, and that is, whether such a transaction as this can be carried out at all. It does appear to me to be contrary to the purview of the Acts of Parliament, so that even if it were not void on the ground of going beyond the memorandum of association, I think it would be void on general grounds. When the Act of Parliament is looked at, I think it will be found that the members of a company limited in shares, which is the only company I have now to deal with, are to be persons (the word "persons" would, no doubt, include a coporation) who are to be liable as members of the company. The 23rd section of the *Companies Act*, 1862, says this: "The subscribers of the memorandum of association of any company under this Act shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registration of the company shall be entered as members on the register of members hereinafter mentioned; and every other person who has agreed to become a member of the company under this Act, and whose name is entered on the register of members, shall be deemed to be a member of the company." How can the company be a member of itself? It is needless to refer to the other sections which have been referred to by Mr. *Chitty*, which shew at once that the word "members" does not mean the company itself: it means some other person or some other corporation. The purview of the whole of the Act, when you look at the sections relating to the winding-up, the mode of winding up, and the mode of enforcing contributions, is utterly inconsistent with the notion that the company can be registered as a member of itself.

It appears to me, therefore, that, independently of the question as to whether or not the articles of association in the present case go beyond the memorandum, the transaction itself cannot by any possibility be valid, having regard to the nature of the company as a company limited in shares, and to the Act of Parliament as to the members of such a company.

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(1) Law Rep. 7 H. L. 653.

Then the next point to be considered is this, whether the transaction is not also invalid by reason of its being a diminution of the capital of the company. I admit that this is a question of very considerable difficulty, and it is a difficulty arising partly from the wording of the 12th section of the *Companies Act,* 1862, and partly from the numerous decisions on the subject, in no one of which is the exact point, as far as I can discover, decided.

I will, first of all, deal with the set of decisions relating to the forfeiture of shares. As to forfeiture, not only are there regulations given in the articles in Table A, but it is expressly referred to in the Act. It is plain that forfeiture is not treated as a diminution of capital. The company does not pay anything on a forfeiture of shares; it simply takes them away from a shareholder who cannot pay his calls. The power of forfeiture is the means of enforcing payment if possible. As long as the shares are worth anything the holder does not let them be forfeited, and pays; it is only when they are worth nothing, and he cannot pay, that he allows them to be forfeited. If I may respectfully say so, I entirely agree with what Lord Justice *James* says in the case of *Hope* v. *International Financial Society* (1). He says, "We have been referred to several cases in which a power to accept surrenders of shares, and the more common case of a power to declare a forfeiture of shares and to deal with those forfeited, have been held to be good. I am reported to have said in one, *Teasdale's Case* (2), that the power to purchase shares would be good. I am not quite sure whether that was not too wide a deduction from the cases to which I was then referring, and certainly it was not necessary for the decision of the case. But, however that may be, when the company deals with an individual shareholder, and does what appears to be right under the circumstances, namely, to accept the surrender from the shareholder who cannot pay, and to release him from further liability, that might be good, although incidentally, and to a small extent it may be said to diminish the capital.

(1) 4 Ch. D. 327, 336.

(2) Law Rep. 9 Ch. 54.

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Of course the diminishing of the capital would not be the object of an act of that kind, and it would not be the intention of the Legislature to interfere with ordinary matters of business of that kind."

Now that applies to forfeiture with very great force. It is quite plain that it is not the meaning of the Act that the power of forfeiture should be interfered with, nor can forfeiture be treated as a diminution of capital.

I now come to the point as to the surrender of shares—a point upon which I feel much more difficulty. It is not for me to say what the limits of surrender are which are allowable by the Act. As I read this same judgment of Lord Justice *James*, certain surrenders are allowable. I can imagine one where the shares would be liable to forfeiture, and it is the shortest way to surrender them; then the same result would follow. But I am by no means prepared to say that there is a right under the term "surrender" to buy up the shares, and to have them surrendered to the company as on an ordinary purchase for money. That, I think, is clearly beyond the limit; but it is not necessary for me to say what is exactly within the limit, because each case as it arises must be decided on its own merits. I can well imagine that certain cases are clearly within the limit and ought not to be treated as a diminution of capital, and that other cases are clearly beyond the limit—such as the cases I have put of an ordinary purchase or ordinary traffic in shares, although the term "surrender" may be employed instead of the transaction taking the form it does here, of an actual transfer to the company.

Having dealt with the case so far, let us see what the 12th section of the *Companies Act*, 1862, must, as I think, mean. The suggestion made on the part of Mr. *Ward* is this, that all the Act of Parliament means is that the company must not alter the terms of the memorandum as to the nominal amount of the capital. It would be a very singular result if that were so, because it would come to this—the company may destroy the whole of its real capital without altering its nominal amount. I will put the case in this way: the company has a million of capital in £10 shares, and has £100,000 paid upon the shares, leaving £900,000 remaining to be paid: there is a power to accept a surrender of shares: the company resolve at a general meeting to retain one share for each of the seven directors, and to accept a surrender of all the other shares. I am putting an extreme case to try the question. According to the argument of Mr. *Ward*, that is perfectly valid; so that the result is that the primary capital of the company is reduced from £900,000 remaining to be called up, to £70, if there are seven directors. That is an extreme case, no doubt, but it shews to what an absurdity you would reduce the provisions of the Act of Parliament if that were allowed. It cannot be said that the conditions of the memorandum mean that the company may in effect destroy the nominal capital: that it cannot so mean is, I think, clear from the words of the section. The company may increase its capital by the issue of new shares to such an amount as it thinks expedient, or it may consolidate and divide its capital to a larger amount than the existing shares, or it may convert the paid up shares into stock. If the section were only to apply to nominal capital, what is the meaning of the power for the company "to convert its paid-up shares into stock?" What the section means is that the company shall not convert the unpaid up shares into stock. That implies, as it has always been held to imply, that the company cannot turn the unpaid up shares into stock, so as to exclude the right of making further calls. Therefore the section must apply to the issued capital, and not merely to the nominal capital; and it has always been so treated as far as I know. There is the additional observation to be made, that the subsequent Acts of Parliament, namely, the Acts of 1867 and 1877, would have singularly little meaning if it were not so, for they contain most elaborate provisions as regards the mode of increasing the capital, and reducing the capital, and as regards the trading capital and the issued capital. The provisions of the section, I admit, are difficult to construe if you read them word by word, but I do not think they are so difficult to construe if you look at the meaning of the whole of the Act as to the formation of these companies. If they are to be taken to apply only to the amount of the nominal capital, I must say that the Acts of 1867 and 1877 are the most extraordinary legislative productions I ever saw. But if you read the section the other way, and say that it means that the conditions in the memorandum relate to the issued capital, then the subsequent Acts are perfectly intelligible. Let us now look at the 9th section of the Act of 1867: "Any company limited by shares may, by special resolution, so far modify"—what?—"the conditions contained in its memorandum of association, if authorized so to do by its regulations as originally framed or as altered by special resolution, as to reduce its capital." What capital? Does that mean nominal capital? It is plain that it means the trading capital. Therefore when you look at the 9th section it is clear that the Legislature considered the 12th section of the original Act somehow or other prohibitive, and that a new Act was required to authorize a company to reduce its capital. Then there are provisions which the Legislature considered necessary for the protection of creditors in case of a reduction of capital.

But it is said a surrender is no more a diminution of capital than is a forfeiture, and the creditors are not injured by a surrender. That, however, is not so. If the company could, either by taking a surrender or by a purchase of shares, actually diminish the capital, not in the shape of dealing with a solitary individual shareholder who cannot pay, but to a greater extent, what would be the result? I am not now speaking of future creditors, who must be held to take with notice of what was on the register What would be the result? Every creditor who could not enforce his demand would lose it. Suppose, for instance, the vendor, having sold the mine to the company, were to take a mortgage of it not to be called in for five years if the interest were duly paid, and the directors then found that they were carrying on business at a loss and could take a surrender of all the shares except seven, then the mortgagee-creditor would be actually without remedy, because he could not apply to have the company wound up until the mortgage debt was due, and that would not be until the end of five years, by which time all the shareholders would have been off as past shareholders for probably four years. So that it is not correct to say that in case of surrender the creditors are protected, because they may all lose all remedy whatsoever, unless indeed their money becomes payable within a twelvemonth after the transaction takes place.

It seems to me that when you look at what I may call the pur-

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view of the Act, it cannot be possible that the company can buy up its own shares in this way so as to destroy the shares in every sense and for every purpose and intent, except that they may, if they can, re-issue or transfer the shares to new shareholders during the intervening period that the capital is diminished, if not absolutely extinguished. That being my view of the whole of the Act, and I may say of the result of the decisions, which really have any bearing on the subject-matter I have to consider, I think the present transaction was a diminution of the capital of the company which is prohibited by the *Companies Act*, 1862, and the transaction is, therefore, void on that ground also.

The transfer being void, and, if I may say so, void at law, although that expression has no longer the meaning that it formerly had, the result is that Mr. *Ward* remains a contributory; and that is the only point I have now to decide.

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Ward appealed. The appeal came on for hearing on the 20th of December.

Davey, Q.C., *Macnaghten*, Q.C., and *Curtis Price*, for the Appellant:—

If it is necessary to refer to the memorandum of association, the power given to the company to do whatever was deemed conducive to the attainment of the objects of the company would authorize such an arrangement as the present, which was entered into to get over the difficulties arising from differences of opinion among the persons having the greatest stake in the company, which would have brought the business to a standstill. But it is not necessary to resort to the memorandum, the power in the articles being express, and there being nothing in it repugnant to the memorandum. The object of clause 10 was not to enable the company to traffic in its own shares, but to buy out shareholders whose continuance in the company was undesirable, and a clause to this effect cannot be considered to add to the business mentioned in the memorandum. It was a power ancillary to the management of the company. The Master of the Rolls went very much upon *Hope* v. *International Financial Society* (1). We do not dispute anything in that case, but we say it is inapplicable. The *ratio decidendi* there was that the arrangement was a device to elude the law as to the reduction of capital. Here there is no reduction of capital, for the shares can be re-issued, they do not cease to exist. *Cree* v. *Somervail* (1). In *Teasdale's Case* (2) the Court treated a power to the company to purchase its own shares as legal. In *Snell's Case* (3), a power given by the articles only to accept surrenders of shares was considered by Lord Justice *Giffard* to be legal, and the transaction in the present case was substantially a surrender. In *Hall's Case* (4) there was a power to accept the surrender and forfeiture of shares, but the company were expressly prohibited from dealing in shares. The transaction in that case was held not to be such a surrender and forfeiture as the articles contemplated, but a dealing in shares, and therefore invalid. That is wholly distinct from this case. In *Zulueta's Claim* (5) it seems to be admitted that if the articles had empowered the company to deal in their own shares the transaction would have been valid. In *Marshall* v. *Glamorgan Iron and Coal Company* (6) it was held that a cancellation of shares if authorized by the articles was good, though there was nothing in the memorandum to authorize it. The Master of the Rolls urges that the question was never argued in these cases, whether such a power in the articles, if not expressly authorized by the memorandum, is good; but the inference from that is that both the Court and counsel thought the validity of the power clear. In the case of *In re Peruvian Railways Company* (7), Lord Justice *Cairns* treats it as sufficient if either the memorandum or the articles confer such a power. In *Wright's Case* (8) a surrender authorized by the articles was held valid. In *Colville's Case* (9) the propositions for which we contend are all laid down. It has been argued that cases as to surrenders are no authority in cases as to powers to purchase, but a power to accept surrenders on such terms as the company thinks fit is really a wider power than a power to pur-

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(1) 4 Ch. D. 327.

(1) 4 App. Cas. 648.
(2) Law Rep. 9 Ch. 54.
(3) Ibid. 5 Ch. 22.
(4) Ibid. 707.
(5) Law Rep. 5 Ch. 444.
(6) Ibid. 7 Eq. 129.
(7) Ibid. 2 Ch. 617.
(8) Ibid. 12 Eq. 334, n.
(9) 48 L. J. (Ch.) 633.

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chase shares, and if the articles may give authority to accept surrenders, there is no reason why their giving a power to purchase should not be effectual. We do not contend that an article allowing the company to set up a broker's office for dealing in its own shares would be valid. That would be extending the business in a way not authorized by the memorandum. What we contend for is that the article is to receive a reasonable construction consistent with the memorandum and to be held to authorize the directors to purchase shares only when such a step is conducive to carrying on the business of the company. The case of *Ashbury, &c., Company* v. *Riche* (1) was referred to below, but has no close bearing on the present case. It was indeed there laid down that a power in the articles which extended the business beyond that contemplated by the memorandum was invalid, but that proposition we do not dispute. In *Phosphate of Lime Company* v. *Green* (2) it was held that a purchase of shares on behalf of the company could be rendered valid by the acquiescence of the shareholders, and Lord *Cairns* (3) refers to this without disapproval, treating the assent of the shareholders as equivalent to the introduction of a new article—a principle which has often been applied in private partnerships. Here the transaction was ratified in the most complete way by the company. The company, having taken the benefit of the arrangement while the business was prosperous, could not repudiate it now, for *Ward* cannot be replaced in his former position, and the liquidator has no better right than the company would have had. As regards the argument that this is a reduction of capital, the word "capital" may be used in three senses: 1. the nominal capital mentioned in the memorandum; 2. issued capital; 3. paid-up capital. The only prohibition against reducing capital in the Act of 1862 is contained in sect. 12, which authorizes a company to increase its capital by the issue of new shares, and prohibits any alterations other than those therein mentioned in the conditions of the memorandum. That refers to the nominal capital. The transaction in the present case does not alter the capital. The company continues to be a company with a nominal capital of £40,000 in 1600 shares, there being no

(1) Law Rep. 7 H. L. 653.
(2) Law Rep. 7 C. P. 43.
(3) Law Rep. 7 H. L. 674.

provision for cancelling the shares purchased, but it being, on the contrary, expressly provided that they may be re-issued. The Act of 1867, 30 & 31 Vict. c. 131, contains no fresh prohibitions, but authorizes the alteration of the memorandum in a way in which the company could not otherwise alter it. The Act 40 & 41 Vict. c. 26 carries the case no further.

Chitty, Q.C., *Kekewich*, Q.C., and *H. B. Buckley*, for the liquidator:—

We submit that even if the power to purchase shares of the company had been contained in the memorandum, it would have been *ultrà vires*, for that such a purchase is a reduction of the capital which tends to the prejudice of creditors, and is effected without any of the safeguards provided by the Act of 1867. The Acts allow no mode of getting rid of shares except three: 1. transfer; 2. forfeiture where a shareholder is in default, and it is therefore for the benefit of everybody interested in the company to get rid of him; and 3. surrender where there is a *bonâ fide* question between the company and the holder as to the title to the shares. There is nothing in the Act or in Table A. expressly referring to surrender, but the authorities no doubt shew that where there is *bonâ fide* dispute between the company and a shareholder a surrender may be accepted by way of compromise if authority is given by the articles. Here the transaction was a purchase, there was no question as to whether *Ward* was a shareholder. In *Ashbury Railway Carriage and Iron Company* v. *Riche* (1) the question as to purchase of shares did not arise. Lord *Cairns* there dealt with *Phosphate of Lime Company* v. *Green* (2) only for the purpose of shewing that it did not conflict with the propositions he was laying down, and he laid down the rule that the memorandum defined the extent of the business. Payment of dividends out of capital has been held illegal: *In re National Funds Assurance Company* (3), though there is no express prohibition of it, the ground being that it is an unauthorized reduction of capital. The Act of 1867 (30 & 31 Vict. c. 131), s. 9, shews that there is no power to reduce the capital except under the powers of that Act. The cases relied

(1) Law Rep. 7 H. L. 653.
(2) Law Rep. 7 C. P. 43.
(3) 10 Ch. D. 118.

upon against us were decided before the present *Companies Act*, and at a time when creditors stood in a very different position. It is true that directors are not trustees for creditors, but that is subject to this qualification, that a creditor can set the winding-up machinery in motion, and place himself in a position very similar to that of a *cestui que trust.* The directors, therefore, have no right to get rid of the capital in a way which will injure the creditors.

[LUSH. L.J.:—A trader till he is bankrupt is master of his own property.]

Snell's Case (1) was a *bonâ fide* case of compromise, not of purchase, and so in *Cree* v. *Somervail* (2). In *Zulueta's Claim* (3), it was held there was nothing in either articles or memorandum to authorize the transaction, and when that conclusion was arrived at no question could arise whether a power to purchase them would be valid. In *In re Peruvian Railways Company* (4) the power in question was a mere incident to carrying on a business, such as would not be naturally mentioned in the memorandum. Here the natural meaning of the 10th clause of the articles is to allow a trafficking in shares, which is a business outside the memorandum, and that clause is therefore invalid. The transfer in this case was invalid, for it was made to a transferee who had no power to hold the shares: *Cartmell's Case* (5). The clauses as to transfer are against the Appellant. Unless he can shew that his shares were got rid of under the provisions of the Act, he is liable; for, apart from those provisions, he could not dispose of his shares so as to escape liability, any more than an ordinary partner can, unless by the consent of all the partners.

[JAMES, L.J.:—The clauses as to transfer do not appear to me to throw any light on the case. This transaction is in substance a surrender to the company.]

The provisions of sect. 26 of the *Companies Act*, 1862, could not be satisfied by such a transfer as this.

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(1) Law Rep. 5 Ch. 22.
(2) 4 App. Cas. 648.
(3) Law Rep. 5 Ch. 444.
(4) Ibid. 2 Ch. 617.
(5) Law Rep. 9 Ch. 691.

COTTON, L.J.:—

This is an appeal from a decision of the Master of the Rolls on an application to remove Mr. *Ward* from the list of contributories. At the time when the winding-up order was made Mr. *Ward* was not, and for seven years had not been, on the register of shareholders; but if he ought to have been there the Court has power to treat him as if he had been there, and put him on the list of contributories. The liquidator, who represents creditors as well as shareholders, contends that he ought to be on the list. Now, what are the rights of the creditors? To make every present and past member of the company liable to the debts and liabilities of the company, and the expenses of winding-up, subject to the limitations in the 38th section of the *Companies Act*, 1862. The rights of the creditors are only against members or persons who have been members within twelve months; and who are members depends on the memorandum, the articles, and the general law. We have then to decide whether Mr. *Ward*, by the arrangement of 1872, effectually got rid of his shares and ceased to be a member. It is admitted that the arrangement by which his shares were transferred to the company was entered into *bonâ fide*. This was not a transfer of the same nature as a transfer to a person who becomes a shareholder, but was a transfer to the company for the benefit of all the other members, in the same way as if the shares had been surrendered. It was no part of the arrangement that the shares should be cancelled; they were given up to the company so that they could be re-issued. We have to determine whether this was valid. The Appellant contends that it was authorized by sub-sect. 12 of clause 3 of the memorandum, which authorizes the doing of all things which the company may consider conducive to the attainment of the objects for which it was established. I do not think that this provision can safely be relied on for the present purpose. A surrender of shares can hardly be considered conducive to the carrying on the business of the company, and I think that the case must turn on the 10th clause of the articles. It is contended on behalf of the official liquidator that this clause authorizes a trafficking in shares, and is therefore illegal as sanctioning a fresh business not authorized by the memorandum. Now, I agree with the Master of the Rolls that nothing contained in the

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articles can make a trafficking in shares legal if the memorandum does not authorize it. Whether it would be legal if the memorandum did authorize it, I do not think it necessary to give any opinion. The question is, whether what has been done is within the terms of the article, and is a thing which, in that case, can legally be done. I am of opinion that what was done was within the terms of the article, and was not prohibited by law. I think that upon the true construction of the article it was not intended to authorize trafficking in shares—not intended to authorize the buying them with a view to making profit by re-selling them—but to authorize the purchase of them if it was thought to be for the benefit of the company that a particular person should cease to be a member. Of course profit might result from the transaction, and the article goes on to provide what is to be done with the profit, if any; but that does not, on a fair construction, point at a purchase for the purpose of re-selling at a profit, or amount to sanctioning a new business. Profit might incidentally arise, but profit was not the object. What was done, then, comes within the terms of the article, is not a trafficking in shares, and does not go beyond the objects of the memorandum; and, independently of the further arguments which I shall proceed to consider, was, as I have said, legal.

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363.

The principal argument of the Respondent against the validity of the transaction was that it was a reduction of the capital of the company. If this transaction is to be held invalid on that ground, I do not see how a surrender or forfeiture of shares is ever to be supported. No doubt a company cannot restore capital to its members, for if they were to receive back what they had paid on their shares, they would be in the same position as if they had not paid it, and would be liable to calls. Again, if a company were by purchase of shares to make itself unable to carry on its business, the transaction would be invalid, as being inconsistent with the objects of the company; and if, as in *Hope* v. *International Financial Society* (1), we could see that the arrangement in the present case was a scheme for restoring capital to the members, the case would stand very differently. We have nothing of that kind here, nor was there any such purchase as to interfere with the business.

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(1) 4 Ch. D. 327.

The company went on for some time prosperously, and but for subsequent events might have continued to do so.

It may be said that the article allows a purchase of shares to an unlimited extent. It is true that in terms it is unlimited, but that is no reason for holding everything done under it invalid, so long as what is done is within legal limits.

It is urged that what has been done is contrary to the spirit of the Acts of 1867 and 1877. I leave out of consideration the Act of 1877, for it only removes a doubt as to the construction of the Act of 1867. The Act of 1867, in my opinion, does not bear on the case. The Act of 1862, sect. 12, allowed the memorandum to be altered by increasing the capital, and in certain other particulars there mentioned, and prohibited its being otherwise altered. If, then, it was wished to alter the memorandum by decreasing the capital, statutory power for that purpose was wanted, and the Act of 1867 gives power to make such alteration on certain conditions. Here what has been done is not prohibited by sect. 12. There has been no reduction of the capital as fixed by the memorandum, there has merely been a purchase of shares which can be re-issued. It cannot be said that because the Acts of 1867 and 1877 have authorized certain alterations in the memorandum, therefore a transaction which does not require any alteration in the memorandum is forbidden by these Acts. I say this with all respect to the Master of the Rolls, who thought that there was here such a reduction of capital as was contrary to the intention of the Legislature.

It was urged that the Act of 1862 provided no mode by which a shareholder could get rid of liability except a transfer; but Mr. *Kekewich* himself answered this argument by the admission that a partner, with the consent of all the other partners, could retire. Here a consent is given by the articles to partners retiring in a certain way, and unless what has been done is forbidden by the Act, we ought not to hold that the company, when authorized by the articles, cannot do it. I am aware that the power given by the 12th article is a dangerous one. It might be attempted to use it for the purpose of enabling a shareholder to escape liability, or to use it to such an extent as to prevent the company from going on; but it is enough to say that if it were used in that way for improper objects, the exercise of it would be invalid.

I am of opinion, then, that the 12th article cannot be held to be forbidden by law, and that by the steps taken under it Mr. *Ward* ceased to be a member. There are authorities which, though none of them decide the precise point, are in favour of the Appellant. The opinion of Lord Justice *Giffard* in *Snell's Case* (1) evidently was that a power in the articles to accept a surrender of shares was valid, though there was nothing in the memorandum pointing at it. The decision of the Master of the Rolls, therefore, must be reversed.

JAMES, L.J.:—

I also am unable to concur in the decision of the Master of the Rolls. It appears to me that there is a fallacy at the bottom of his judgment, and also of the argument that there is some peculiar right in the creditors of the company. I am of opinion that the creditor *quâ* creditor has no right except according to the statute, and within the limits prescribed by the statute. He has a right to proceed against every present member, and against every past member who was a member within twelve months before the commencement of the winding-up. That is the extent of his right. Creditors know, or have the means of knowing, who are the shareholders in a company, and the limit of twelve months was fixed because a creditor may be presumed to go on trusting a company on the faith of the persons who were shareholders when his debt was contracted, until he has means of knowing that a change of shareholders has taken place. A creditor, I say, as such, has no right except as against members; and who are members must be tried just in the same way as if there was no winding-up—in the same way as if this company, being a going concern, had applied to have Mr. *Ward* put on the register. There would have been an abundant answer to such an application. A clause in the articles, to which all the shareholders were parties, expressly authorized the company to buy its own shares. The company accordingly bought Mr. *Ward's* shares. It is

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(1) Law Rep. 5 Ch. 22.

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replied "Yes, but that clause is so large as to allow the company to traffic in shares, which is a business not authorized by the memorandum of association, and being so large it is bad *in toto*." There is a fallacy in that argument. The memorandum limits the objects of the company, and so prevents trafficking in shares. Such trafficking would, therefore, be illegal, and if the directors spent money of the company in it, the company could hold them liable if it took steps for that purpose within a reasonable time. But, apart from that, the dealing in the shares would be effectual. The purchasers who took them could not get rid of them, and the company could not claim them back from the purchasers; the only result of the illegality would be that the directors would be personally liable for any loss. Here the purchase was authorized by the articles, and was assented to by a meeting of the shareholders; and I am prepared to adopt the view, that even if there had been anything questionable in the transaction as between the directors and Mr. *Ward*, still the matter being a mere domestic matter, a question whether a particular shareholder should or should not retire—if the transaction was *ultrà vires* the directors, it was not *ultrà vires* the company, and having been confirmed by the company, and the company having acquiesced in it, and taken the benefit of it, it could not now be questioned by the company. If the company could not question it, neither can a creditor, for he can obtain nothing but what the company can get from the shareholders. The liability of the shareholders is to the company, and to no one else, except as regards the provisions relating to the liability of past members.

LUSH, L.J. :—

I am of the same opinion, and do not think that I can usefully add anything.

Solicitors: *Emmet & Son; Pilgrim & Phillips.*

H. C. J.

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Ex parte NATIONAL PROVINCIAL BANK OF ENGLAND. *In re* REES.

Proof in Bankruptcy—Guarantee to Bankers—Payment by Surety after Proof by Creditor—Reduction of Proof—Agreement between Surety and Creditor that Receipt by Creditor of Dividends in Bankruptcy of principal Debtor shall not diminish Liability of Surety to pay in full.

A customer gave to his bankers, as a security for the balance which might from time to time be due from him to them, the joint and several bond for £1000 of himself and a surety, the liability of the surety being expressly limited to £500. There was a proviso in the bond that any dividends received by the bankers in the bankruptcy of the customer should not, so far as concerned the surety, go in discharge of his liability; but the bankers should notwithstanding be entitled to recover on the bond against the surety to the full extent of £500, or so much thereof as should, together with the dividends, amount to 20*s.* in the pound on the debt due by the customer to the bankers. The customer filed a liquidation petition, and the bankers proved for the debt due to them. Afterwards the surety paid the bankers £500, and he then proved in the liquidation for £500:—

Held, by *Bacon*, C.J., that the proof of the bankers must be reduced by £500, but that this reduction would not prejudice any right of the bankers against the surety.

Held, by the Court of Appeal, that the bankers were entitled to retain their proof for the full amount.

THOMAS REES, an hotel-keeper at *Aberayron*, kept an account with the *National Provincial Bank of England*. On the 31st of August, 1878, he, and *D. J. Powell* as a surety for him, executed a joint and several bond for £1000 in favour of the bank, to secure the repayment of any moneys then due or which should from time to time be due to the bank from *Rees*. The bond provided that the surety should not at any time be called on to pay a greater amount in the whole for principal moneys than £500, in addition to interest, costs, commission, and other lawful charges; and that the bond should be a continuing security to the bank "for all and every such sums and sum of money as aforesaid, notwithstanding any settlement of account or other matter or thing whatsoever." There was also the following clause: "Provided always, that if the said *Thomas Rees* shall at any time become bankrupt or enter into any composition or arrangement with or make any assignment for the benefit of his creditors, and from this or any other cause the said bank shall at any time receive any dividends or dividend on the estate or estates of the said *Thomas Rees*, such dividends or dividend shall not, so far as concerns the said surety, go or be taken as in discharge of any principal moneys to the extent of the same sum of £500, or the said interest, costs, commission, or other lawful charges for which the said surety may be liable under the said bond, but the said bank shall, notwithstanding, be entitled to recover on this security against the said surety to the full extent of the said sum of £500 principal moneys, together with the said interest, costs, commission, and other lawful charges, or so much thereof as shall, together with such dividends or dividend, amount to the sum of 20*s.* in the pound on the whole amount or amounts in respect whereof or any part whereof the said bond shall then be a security, and which shall be then due or owing to the said bank, and that the said bond shall be in addition and without prejudice to any other security or securities which the said bank or any trustees or trustee thereof now have or has or hereafter may have for any sums or sum secured or intended to be secured by the said bond or any part thereof."

In November, 1879, *Rees* filed a liquidation petition, and at the first meeting of the creditors on the 3rd of December, 1879, the bank tendered a proof for £2494 7*s.* 10*d.*, and the proof was admitted and filed. In the early part of the year 1880 *Powell* paid to the bank the sum of £509 0*s.* 10*d.* in discharge of his liability for principal and interest due on the bond, and the bond was delivered up to him. In April, 1880, *Powell* sent to the trustee a proof against the debtor's estate for £509 0*s.* 10*d.*, and this proof was afterwards, without the knowledge of the bank, admitted by an order of the County Court. The trustee had previously, on the 27th of November, 1880, given notice to the bank that he rejected their proof to the extent of £509 0*s.* 10*d.*, and that he intended to exclude them from dividend in respect thereof. The bank applied to the County Court for an order that the trustee should admit their proof for the full amount. The Registrar affirmed the decision of the trustee.

The bank appealed to the Chief Judge. The appeal was heard on the 7th of February, 1881.

Yate Lee, for the Appellants:—

After a proof has stood for more than a year the trustee cannot reject it; he ought to apply to expunge it: *Ex parte Good* (1).

[BACON, C.J.:—This is really an application to expunge.]

The peculiar form of the bond gives the bank the right to retain their proof for the full amount: *Midland Banking Company* v. *Chambers* (2). The present case is identical with that. If our proof is reduced by what the surety has paid he would be entitled to prove in respect of his payment. The effect of the stipulation in the bond is to release that right of proof to us, and therefore our proof ought to stand for the full amount. No additional liability will be thrown on the bankrupt's estate; the question is only one between the creditor and the surety.

E. Cooper Willis, for the trustee, was not heard.

BACON, C.J.:—

There seems to have been some confusion in mixing up the separate contract between the surety and the creditor with the right of the creditor to prove in the bankruptcy. Suppose that a creditor had realized every security which he held for his debt, and that not a farthing remained due to him, would it not be right to strike his proof out altogether? What difference can it make in principle that a part only of the debt has been paid by the realization of a security? This has nothing whatever to do with the contract between the creditor and the surety, which only means that the surety shall not assert as against the creditor his right to stand in his place and prove in the bankruptcy. That agreement has nothing whatever to do with the administration in bankruptcy. The creditor has received in full from the surety £500, part of the amount of his proof; he cannot also retain his proof for the £500. This is every-day administration in bankruptcy. The bond is paid in full, and the debt is so far acquitted. The surety does not seek to interfere with any right of the bank. The bank's proof must of necessity be reduced by the sum which the surety has paid.

(1) 5 Ch. D. 46.

(2) Law Rep. 4 Ch. 398.

Yate Lee:—The surety has carried in a proof for the £509. This proof ought to stand for our benefit.

BACON, C.J.:—I have nothing to do with that now. My order will not interfere with any question between the bank and the surety.

From this decision the bank appealed. The appeal was heard on the 7th of April, 1881.

De Gex, Q.C., and *Yate Lee*, for the Appellants:—

After a proof in bankruptcy has been made it cannot be reduced by reason of a payment received by the creditor from a third party: *Ex parte Wildman* (1); *Ex parte Joint Stock Discount Company* (2). But the effect of the peculiar form of the bond is that the surety sells to the creditor the right which he would otherwise have had to stand in his shoes, and have the benefit of the proof to the extent of the payment which he has made: *Ex parte Miles* (3); *Midland Banking Company* v. *Chambers* (4); *Ex parte Hope* (5).

E. Cooper Willis, for the trustee:—

The ordinary rule is that a surety who has paid the debt to the creditor, is entitled to receive the dividend on the creditor's proof in the debtor's bankruptcy: *Gray* v. *Seckham* (6); *Ex parte Turner* (7); *Ex parte Rushforth* (8); *Thornton* v. *M'Kewan* (9). This general rule is not excluded by the words of the bond in the present case. The words differ from those of the bond in *Midland Banking Company* v. *Chambers*. A creditor who holds a bill of exchange as security for his debt, cannot prove his debt in bankruptcy without producing the bill: *Ex parte Jacobs* (10); *Ex parte Ashworth* (11). The same principle applies to bonds, and here the bond has been given up to the surety. As his proof has been admitted, there will be a double proof for the £509 0*s*. 10*d*.

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(1) 1 Atk. 109.

(2) Law Rep. 19 Eq. 1; Ibid. 10 Ch. 198.

(3) De G. 623.

(4) Law Rep. 4 Ch. 398.

(5) 3 M. D. & D. 720.

(6) Law Rep. 7 Ch. 680.

(7) 3 Ves. 243.

(8) 10 Ves. 409.

(9) 1 H. & M. 525.

(10) Law Rep. 17 Eq. 575.

(11) Ibid. 18 Eq. 705.

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JAMES, L.J.:—

I think this order must be discharged. It appears to me that both of the learned Judges must have been under some misapprehension as to the facts. They seem to have treated it as a separate debt, as if the debtor and the surety had entered into an ordinary bond for £1000, with a condition for the payment of £500, and, that debt being discharged, the whole debt was gone. Possibly the proviso in the bond would have had no operation if the whole debt had been gone. But that is not this bond. The bond seems to me to give the bank the same right even without the proviso. It is important to look at the condition of the bond. The penal sum is £1000, and both the debtor and the surety join in the bond for that sum, but the condition is to pay that which shall be the ultimate balance of the banking account, including principal, interest, commission, and all the ordinary banking charges whatever they may be. The condition of the bond is to pay that, but there is a defeasance on that obligation, viz., that the surety, although he is called upon to pay the ultimate balance, is not to be liable beyond the extent of £500. It is not that he was surety only for £500; he was surety for the whole debt with that limitation. Although the ultimate liability could be enforced against him, he being surety for the whole, he was only to be called upon to the extent of £500. He had no equity arising out of any reduction of the ultimate balance if the principal debtor had paid part of the debt. Of course the bank had a right, if they chose not to put the bond in force until the whole thing had been wound up, to say, "The ultimate balance due to us is more than £500, pay us the £500." That would be their right. It does not signify in what mode or by what steps that ultimate balance due to them was to be ascertained. Therefore, independently of the proviso, it seems to me that their right would be the same. But the proviso is perfectly clear. To use the expression of Lord Justice *Knight Bruce* in *Ex parte Hope* (1), "The sureties who paid a portion of the debt would, or might have been, entitled to the dividends on that portion, if there had been no such proviso; by the proviso they in effect sell their right in these dividends to the creditor." So in the present case the surety has chosen to contract himself out of that possible equity in the plainest and most distinct terms, and, as Lord Justice *Knight Bruce* said, he can have no right to intercept any dividend which would otherwise be payable to the principal creditor.

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(1) 3 M. D. & D. 723.

Therefore I am of opinion that the order must be discharged, and with costs in all three Courts.

BRETT, L.J.:—

I am of the same opinion. I think there has been a misapprehension of the facts.

COTTON, L.J.:—

I think, especially having regard to the proviso, that this must be taken to be a bond, not for part of the debt, but to secure payment of the ultimate balance. The proviso clearly points out that that is so, that the surety is not to take advantage of any payments made from time to time by the principal debtor, bu is to be liable, though not to a greater extent than £500. Therefore he is not entitled to hold the bank as accountable to him for any dividend they may receive from the principal debtor's estate, or to expunge part of their proof.

Solicitors for Bank: *Wilde, Berger, & Co.*
Solicitors for Trustee: *Jones, Blaxland & Son.*

W. L. C.

M. R.
1881
Feb. 28.

KINSMAN *v.* ROUSE.

[1878 K. 140.]

Mortgage—Mortgagor in Possession of Part of Mortgaged Property—Mortgagee in Possession of Remainder—Right to redeem—Persons under Disability—Absence of Mortgagor beyond Seas—Statute of Limitations (3 & 4 *Will.* 4, *c.* 27), *ss.* 16, 28.

Post 184
19 Ch. D. 543

The rule that prevailed prior to the *Statute of Limitations* (3 & 4 Will. 4, c. 27), that no lapse of time barred the right of a mortgagor of lands to redeem the whole provided he held possession of part (*Rakestraw* v. *Bruyer* (1)) has been abolished by sect. 28 of the statute.

Accordingly, where a mortgagee had been in undisturbed possession of part of the land comprised in the mortgage for upwards of twenty years, the right of the mortgagor to redeem was held to be barred by that section, although he held possession of the remainder of the land.

Sect. 16 of the *Statute of Limitations* (3 & 4 Will. 4, c. 27), saving the rights of persons under disability, such as absence beyond seas, does not apply as between a mortgagor and mortgagee.

BY an indenture dated the 11th of October, 1847, the Plaintiff, *Richard Kinsman*, assigned certain leasehold farms in the county of *Devon* belonging to him to the Defendant, *Betsy Rouse*, and *Mary Ann May*, by way of mortgage for securing the repayment to them of the sum of £1600 and interest, with a power of entry in case of default.

By an indenture dated the 31st of March, 1849, the Plaintiff, *Kinsman*, assigned the same premises to *John Collins Browne* and *Samuel Banbury* (subject to the existing mortgage) by way of mortgage for securing the repayment to the said *John Collins Browne* of £120 and interest, and to the said *Samuel Banbury* of £60 and interest.

Shortly after the date of the latter mortgage the Plaintiff, *Kinsman*, allowed *Samuel Banbury*, one of the second mortgagees, to enter into possession of two fields forming part of the premises comprised in the mortgage. *Samuel Banbury* continued in possession and in the receipt of the rents and profits of these two fields until his death in 1853, since which period his widow and administratrix, the Plaintiff, *Mary Ann Banbury*, had remained in possession.

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(1) Select Cas. in Ch. 55; Moseley, 189.

In 1849 the Plaintiff, *Kinsman*, emigrated to *Canada*, where he had since resided. For some time after his emigration he continued to pay the interest on the first mortgage; but in May, 1855, the interest having then fallen into arrear, the first mortgagees entered into possession of the receipt of the rents and profits of the mortgaged premises with the exception of the two fields.

In October, 1855, *Betsy Rouse* married the Defendant *Eusebius Rouse*, and in 1871 *Mary Ann May* died, having by her will bequeathed all her estate and interest in the mortgaged premises and in the mortgage debt of £1600 and interest to *Betsy Rouse* upon the trusts therein mentioned; and she appointed *Betsy Rouse* her executrix.

Since the first mortgagees entered into possession no payment had been made by any person in respect or on account of the first mortgage.

John Collins Browne, one of the second mortgagees, died in 1872, but no claim had been made by or under him in respect of the second mortgage for more than twenty years prior to the commencement of this action.

The action was by *Kinsman*, the mortgagor, and *Mary Ann Banbury*, the present second mortgagee, against *Eusebius* and *Betsy Rouse*, and the trustee of their marriage settlement, as first mortgagees, for the usual accounts against mortgagees in possession and for redemption.

The Defendants, by their statement of defence, admitted that their title to the two fields of which the Plaintiff, *Mary Ann Banbury*, was in possession, had been barred by lapse of time, and disclaimed all interest therein. They, however, submitted that the Plaintiffs were not entitled to redeem the first mortgage, on the ground that their claim was barred by lapse of time and by the operation of the *Statute of Limitations* (3 & 4 Will. 4, c. 27).

The writ was issued on the 28th of December, 1878, before the date of the commencement of the *Real Property Limitation Act*, 1874.

The action now came on for trial.

Bagshawe, Q.C., and *Cracknall*, for the Plaintiffs:—

The possession by the Plaintiff, the second mortgagee, of the two fields forming part of the mortgaged property, is the possession of the other Plaintiff, the mortgagor; and the old rule prior to the *Statute of Limitations* (3 & 4 Will. 4, c. 27) was that so long as the mortgagor continued in possession of any part of the mortgaged property he was entitled to redeem the whole, and such right was not barred by lapse of time: *Rakestraw* v. *Bruyer* (1); *Burke* v. *Lynch* (2); *Blake* v. *Foster* (3). And it seems to be considered by the text-writers that the rule still applies under the statute: *Powell* on Mortgages (4); *Fisher* on Mortgages (5); *Coote* on Mortgages (6). The words "any land" in the 28th section should be construed to mean the land comprised in the mortgage: that is to say, the mortgagee, in order to claim a title by adverse possession, must have been in possession of the whole of the mortgaged property.

Then the mortgagor being absent beyond seas should be treated as a person under disability, whose right to recover the land is saved by the 16th section.

Davey, Q.C., and *C. T. Simpson*, for the Defendants, were not called upon.

JESSEL, M.R.:—

I must say that in my opinion there is no reasonable doubt as to the meaning of the 28th section of the statute.

The section says this: "When a mortgagee shall have obtained the possession or receipt of the profits of any land,"—"any" land, not "the" land—"or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage, but within twenty years next after the time at which the mortgagee obtained such possession or receipt;" and so on. Of course that means that the mortgagor shall not redeem the mortgage on the land of which possession is taken: it cannot refer to any other land.

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(1) Select Cas. in Ch. 55; Moseley, 189.

(2) 2 B. & B. 426.

(3) Ibid. 565.

(4) 6th Ed. vol. i. p. 388 a.

(5) 3rd Ed. pp. 734, 735.

(6) 4th Ed. by *Mackeson*, pp. 930, 932.

Suppose a mortgagee, in taking possession, omits by mistake to take possession of a piece of land included in the mortgage, not knowing that it is comprised in the mortgage deed, and some other mortgagee takes possession of that piece of land, would the first mortgagee lose the benefit of the possession he had taken under his mortgage? Certainly not. In the present case the first mortgagees have been in possession of part of the land for more than twenty years, which is a sufficient compliance with the section; for, in my opinion, it is sufficient if the mortgagee has taken possession of "any land" comprised in the mortgage. To my mind, the meaning of the section is quite clear, and there is nothing in the subsequent words of the section to interfere with the construction I have adopted.

Then it is said that before the Act the law was different, and that the mortgagor's right to redeem could not be barred so long as he held possession of part of the land. Whatever the law was before the Act, it does not, in my opinion, alter the proper meaning of the section, which is, that the moment the twenty years' possession by the mortgagee of any part of the land has run, the title of the mortgagee to the land of which he has taken possession is absolute.

Then it is said that the right of a mortgagor to bring an action to redeem is saved by his "absence beyond seas," under the 16th section. But the 28th section contains no qualification of the mortgagee's title under it. The 16th section saves the right of any person "to bring an action to recover any land," where such person was under any disability, such as absence beyond seas, at the time the right first accrued: but that does not apply to a mortgagor. An action to redeem is not, properly speaking, "an action to recover land": the section evidently refers to cases of ordinary ownership, where the rightful owner of land has been dispossessed.

The 28th section contains no qualification of the rights of the mortgagee as against the mortgagor, and, in my opinion, for this reason, that it was not intended to put the rights of the mortgagee

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upon the same footing as the rights of persons claiming under an ordinary disposition of land.

It appears to me that there is no reason for extending the saving of the 16th section to the case of a mortgagor.

I therefore dismiss the action, with costs.

Solicitors: *A. F. Coe*, agent for *C. Smale, Bideford*; *R. B. Toller*.

G. I. F. C.

M. R.
1881
March 25.

In re GRUNDY, KERSHAW, & CO., SOLICITORS.

Costs—Taxation—Party and Party—Solicitor and Client—Attorneys and Solicitors Act (6 & 7 *Vict. c.* 73), *s.* 38.

A creditor's petition to wind up a company having been withdrawn on payment of the debt, the solicitors for the company undertook by letter with the petitioning creditor's solicitors "to pay all proper costs and charges incident to and recoverable under such petition, such costs, in case of difference, to be taxed."

The amount of the costs not being agreed upon, the company obtained, *ex parte*, an order to tax under the third party clause (sect. 38) of the *Attorneys and Solicitors Act*, and served it on the solicitors of the petitioning creditors:—

Held, on motion to discharge the order, that the undertaking was a personal undertaking to pay the costs, such costs being costs as between party and party; that the 38th section of the Act had reference only to the taxation of costs as between solicitor and client; that the order, therefore, was irregular, and must be discharged with costs to be paid by the company.

Re Hartley (1) considered and explained.

MOTION.

On the 21st of January, 1881, a petition was presented by Messrs. *Grundy & Co.*, as solicitors acting on behalf of *Greenough* and another, to wind up the *Bedford Brewing and Malting Company*, which petition was answered for the 4th of February then next, but before that day the company paid the debt in respect of which the petition was presented.

On the 2nd of February Messrs. *Hulton & Lister*, the solicitors

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(1) 30 Beav. 620.

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of the company, gave Messrs. *Grundy & Co.* an undertaking in the following terms:—

"*Re Bedford Brewing Company.*

"Dear Sirs,—In consideration of your withdrawing the petition for the winding-up of this company we undertake to pay all proper costs and charges incident to and recoverable under such petition. Such costs in case of difference to be taxed.

"Yours truly,

"Messrs. *Grundy, Kershaw, & Co.* "*Hulton & Lister.*"

The petition was subsequently withdrawn, and *Grundy & Co.* in due course sent to *Hulton & Lister* an account of their costs, but they were unable to agree to the amount of such costs with *Hulton & Lister*, and on the 2nd of March *Grundy & Co.* were served with an order, dated the 25th of February, 1881, made on the petition of the company, referring it to the Taxing Master to tax and settle the bill, and ordering that if such bill when taxed should be less by a sixth part than the bill as delivered, the Master should tax the Petitioners their costs of such reference, and if such bill when taxed should not be less by a sixth part than the bill as delivered, the Master should tax the solicitors their costs of such reference.

On attending the taxation *Grundy & Co.* contended that the order of the 25th of February was irregular, as inapplicable to a taxation as between party and party on which scale the costs payable under the said undertaking were to be taxed, but proposed before the Master and afterwards (the appointment to tax being adjourned), by letter to *Hulton & Lister*, that the Master should treat the order of the 25th of February as an order made on the petition to wind up, for taxation of the Petitioner's costs and payment thereof by the company.

That offer not being accepted, this was a motion on behalf of *Grundy & Co.* that the order of the 25th of February, 1881, for the taxation of the bill of costs might be discharged, with costs to be paid by the company.

Cozens-Hardy, in support of the motion:—

The order of the 25th of February is irregular. The only authority under which such an order can be made is the 38th

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section of the *Attorneys and Solicitors Act* (6 & 7 Vict. c. 73), but under that section the taxation must be as between solicitor and client. We submit that the costs payable under the undertaking given by *Hulton & Lister* are costs as between party and party only. The words in the undertaking "and recoverable under" clearly shew that the costs which they undertook to pay were the costs up to that time which would have been allowed had the petition proceeded and an order been made thereunder for payment of costs by the company, such costs being only party and party costs.

The undertaking, moreover, was a personal undertaking on the part of *Hulton & Lister*, and the order to tax should have been obtained in their name and not in the name of the company. No authority can be cited for an order being made in the matter of solicitors for taxation of their costs as between party and party.

On every ground the order of the 25th of February should be discharged, and, having regard to the offer made before the Master and by letter which was refused, it should be discharged with costs.

Romer, for the company:—

The case is clearly within the words of the 38th section of the Act, which are, that any person not the party chargeable, who shall be liable to pay the bill, may make the same application for a taxation as the party chargeable might himself make, "and the same reference and order shall be made thereupon, and the same course pursued in all respects, as if such application were made by the party so chargeable with such bill."

A third party is entitled to get an order to tax as of course. In *Re Hartley* (1) *A.* and *B.* compromised a suit, *B.* agreeing to pay *A.'s* costs, any question to be referred to an arbitrator. *A.'s* solicitor delivered his bill of costs to *B.*, and it was held that *B.* was entitled to a taxation by an order of course.

An agreement to pay costs is an agreement to pay taxed costs, and a third party paying a solicitor's bill of costs stands in the same relation with respect to the right of claiming taxation as the solicitor's client: *Vincent* v. *Venner* (2). I submit that the order to tax was regular, and that this motion must be refused.

(1) 30 Beav. 620.

(2) 1 My. & K. 212.

JESSEL, M.R.:—

This is an application to discharge an order of course for the taxation of a solicitor's bill. The order has been obtained under a very extraordinary misapprehension of what the rights of the parties really are.

The solicitors whose bill was taken in were the solicitors of petitioners who petitioned for the winding-up of a company. The company did not like the petition to go on, and their solicitors, who are gentlemen practising at the not unknown place of *Manchester*, and who must be taken to understand the meaning of very plain terms, and the very short and businesslike letter they wrote on the 2nd of February, 1881, wrote this letter:—[His Lordship read the letter above set out.] That offer was accepted and the petition withdrawn.

The meaning of that letter is so plain that I can only use the words of it. It is an undertaking to pay by the solicitors of the company. The company is alleged to be insolvent, and therefore the solicitors give their personal undertaking. They perfectly well knew (at least I must assume so) that "we undertake to pay" made them personally liable. And I do not suppose they were ignorant of the fact that it would not do for the company to undertake to pay, because, if another winding-up petition intervened, that undertaking would not be of any avail. Independently of the company being insolvent, therefore, there was an excellent reason why they should give their personal undertaking, because nothing but that or cash would have been accepted.

Then, having given that undertaking to pay, and the petition having been withdrawn, *Grundy & Kershaw* send in a bill of costs to *Hulton & Lister*, and they head it "In the Matter of the *Bedford* Brewery and in the Matter of the Companies Acts—Messrs. *Grundy's* charges." They do not make out the bill to anybody. In fact, it is a bill against their own client, but it would be limited to party and party costs, and the only person they could charge in law would be their own client, or *Hulton & Lister* under the undertaking, but *Hulton & Lister* were only liable to pay the "costs and charges incident to and recoverable under the petition"—that is, party and party costs—and they were to be taxed in case of difference.

Now, if *Hulton & Lister* wanted them taxed, their course was a very simple one—that was, to take out a summons and get them taxed under the agreement. They could not tax under the third party clause, because the third party clause only applies to solicitor and client costs. It is a taxation between solicitor and client, and is conducted in a totally different way to a taxation between party and party. In an ordinary taxation between party and party the costs of the taxation are borne by the person taking the taxation. I by no means am prepared to say that that is a universal rule which cannot be disregarded. No doubt there is a discretion in the Taxing Master, and if he finds a solicitor bringing in an extortionate bill with the view of increasing the costs of taxation, so as to take advantage of that rule, I have no doubt he can report specially, and that the Court has authority not only to deprive that solicitor of costs, but make him pay costs for taking such an improper proceeding. But that is merely saying that the rule may be abused, and that the Court is strong enough to punish such abuse. But in an ordinary case the costs of taxation are not paid by the solicitor whose bill is taxed, but by the party who obtains the taxation, whereas under the order of course the costs depend upon the result of the taxation. If more than one-sixth is taken off, the solicitor has to pay the costs of taxation. So that there is a very great difference in the mode of taxation and in the result of the taxation—that is, it is not a solicitor and client taxation, and the costs of taxation are differently dealt with.

But beside that, there is another objection to the order. It was obtained, not by Messrs. *Hulton & Lister*, who undoubtedly were entitled to an order to tax (on the usual terms of being liable to pay, that is, to pay the amount found due on the bill and also the costs of taxation), but it was obtained by the alleged insolvent company by an order of course, and I cannot see how the solicitors could get the money under the order, because if the company was really insolvent, as alleged, of course they would not get it, and they might become mere creditors in the liquidation. Therefore, it was obtained by the wrong people, and was obtained on an allegation that the solicitors delivered to the Petitioners—which was not true—their bill of costs, which contained improper charges, and therefore they asked for taxation. So that you have the wrong Petitioner, wrong jurisdiction, and the wrong order. It is all wrong—in every way and in every possible way. I believe there is another mistake beside.

That being so, the solicitors move to discharge the order.

First of all it is alleged that the delivery of the bill in the way I have mentioned does not amount to delivery of the bill to the company. Of course it does not. There is no liability on the part of the company at all to pay these costs—that is, no direct liability. They may be (and probably are) liable to pay *Hulton & Lister*.

Then it is said the order can be defended, first of all on an alleged waiver, the waiver being this, that the solicitors very properly not wishing to incur costs for nothing, and I suppose believing somebody would pay them, offered to let the taxation go on if it were corrected and made a taxation of party and party costs, and if it were agreed that they were to have the costs of the taxation. That was not accepted. If it had been it would have been a waiver as far as *Hulton & Lister* were concerned. But not being accepted, of course there is no waiver of their strict rights.

Then two cases were relied on, on one of which I wish to say a word or two, because it is imperfectly reported. I have no hesitation in saying that I think, under the peculiar circumstances of that case, the order was right. Therefore, it must not be supposed that any observations I make on it involve a difference of opinion as to the order. But the case is so imperfectly reported that it might mislead any one who did not look at it minutely. It is *Re Hartley* (1). There was a suit of *Milne* v. *Wild*, and a cross-suit, and by agreement the suits were compromised between *Milne* and *Wild*, on the terms that the costs of *Milne* incurred in the suits should be paid by *Wild*. It does not say in the report, "incurred as between solicitor and client," but it seems to have been so on looking at Mr. *Follett's* argument, who cites an unreported case of *Re Bellyse*, in which the compromise was that the costs were to be taxed as between solicitor and client, and from the judgment of the Master of the Rolls, who speaks of that case, "I was referred by Mr. *Follett* to a case in which I decided the point. I find I there referred to *Vincent* v. *Venner* (1), which expressly decides the case." In *Vincent* v. *Venner* there was an agreement for compromise, and the costs of the suit as between solicitor and client were to be paid by the petitioner. So that *Vincent* v. *Venner* and *Re Bellyse*, which are said to be in point, did contain the words "as between solicitor and client," and I have no doubt that the word "incurred" as used in Mr. *Beavan's* report meant "incurred as between solicitor and client." I have no doubt whatever, from the argument and judgment, that in that case the costs were to be as between solicitor and client. The next point in the case was this:—The costs being payable as between solicitor and client by *Wild*, *Hartley* delivered the bill of costs to *Wild*, that is [as it was put in the argument], he adopted the agreement. He then sought to discharge the order of course obtained by *Wild* under the third party clause, on the ground that *Wild* was not liable to pay except by contract between himself and *Milne*, and that ought not to affect *Milne's* liability to pay *Hartley*.

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(1) 30 Beav. 620.

The answer was, he had adopted the agreement as between *Milne* and *Wild*, that he was to look to *Wild* for payment. *Wild* had become liable to pay the bill by subsequent contract, that the terms of the third party clause were wide enough to include the case, and that under these circumstances *Hartley*, having delivered the bill to *Wild*, could not complain of *Wild* obtaining the order for taxation under the third party clause. But in that case it is clear that *Hartley*, being treated as having adopted *Wild* as his paymaster, was not injured at all; he got the costs taxed in exactly the same way as they would have been taxed against *Milne*, that is, under the third party clause. The costs of taxation of course followed the usual rule as to the one-sixth, and the only difference was that *Wild*, against whose solvency not a word was said, was substituted for *Milne*, but that was done by *Hartley's* own act in sending the bill to *Wild*. If he had declined to send the bill to *Wild* and had sent it to *Milne*, probably the decision would have been the other way. That being so, it is no authority in this case, where the costs are as between party and party, and where nothing has been done by *Grundy & Co.* to adopt the com-

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(1) 1 My. & K. 212.

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pany as paymaster. They have only sent the bill headed, as I have said, to *Hulton & Lister*, who, as far as they are concerned, are their paymasters. The result, therefore, is, I must discharge the order and give the applicants the costs of the present application. The applicants have very reasonably said they only want the right order. They do not want to put the other side to the expense of a summons, and as Mr. *Romer* is willing to take the right order, I will make the order to tax the bill on the application of *Hulton & Lister* as between party and party in the usual way.

Solicitors: *Pritchard, Englefield, & Co.; Milne, Riddle, & Mellor.*

G. M.

EAGER *v.* FURNIVALL.

[1881 E. 288.]

M. R.
1881
April 4.

Demurrer—Will—Devise to Married Daughter—Death of Devisee in Lifetime of Testator—Wills Act (7 *Will.* 4 & 1 *Vict.* c. 26), *ss.* 3, 33—*Seisin—Husband—Tenant by the Curtesy.*

A testator died in 1875, having by his will, dated in 1872, devised a freehold estate to his daughter (the Plaintiff's wife), her heirs and assigns, for her separate use.

4 Ch D6
/614.

The daughter died in 1874, in the lifetime of the testator, leaving an only child, who was her heiress at law.

The Plaintiff claimed to be entitled for his life as tenant by the curtesy.

Held, upon demurrer, that the Plaintiff was entitled for his life to the property devised by the testator as tenant by the curtesy.

DEMURRER.

W. H. Furnivall died on the 21st of May, 1875, having made his will, dated the 28th of June, 1872, whereby he gave and devised a certain freehold house and premises, with the appurtenances, to his daughter *Grace Isabella Eager*, her heirs and assigns, for her own sole and separate use and benefit independently of any husband.

Grace Isabella Eager was then the wife of the Plaintiff, having been married in 1871. She died on the 30th of April, 1874, in the lifetime of her father, the testator. There was issue of the

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marriage between her and the Plaintiff one child only, namely, the infant Defendant *Grace Eager*, who was the sole heiress at law of her mother.

The rents of the premises since the death of the testator had been received by the Defendant *Furnivall*, who was one of the executors of the testator, the Plaintiff being the other of such executors, and some of the rents had been invested in consols in the names of the Plaintiff and the Defendant *Furnivall.*

The Plaintiff claimed a declaration that he became from the death of the testator and then was entitled for his life to the premises as tenant by the curtesy, and that the accruing rents might be paid to him and the investments transferred and paid to him.

To this statement of claim demurrers were put in on behalf of the infant Defendant and the Defendant *Furnivall.*

Macaskie, for the first demurrer:—

The seisin of the wife or of the husband in her right is a circumstance absolutely required in order to entitle the husband as tenant by the curtesy, but in this case, as the devisee died before the testator, in no sense can she be said to have been seised during the coverture. The estate did not vest in her at all during the coverture, so that neither she nor her husband during her life could enter, so as to give him a title as tenant by the curtesy.

It will, no doubt, be urged on the other side that the 33rd section of the *Wills Act* is applicable to this case. That section provides that "where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will." Now the effect of that section is simply to prolong the life of the devisee or legatee, as the case may be, by a fiction, for a particular purpose, namely, that the devise or legacy may not lapse, but certainly not for any

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other purpose. In this case the section only makes the devisee the medium by a fictitious life for carrying the devise through her to her child; the section cannot be read as prolonging the life of the devisee for all incidents, so that the coverture may be prolonged coextensively with the life: *Pearce* v. *Graham* (1). *Johnson* v. *Johnson* (2) is also a decision in my favour.

[He also referred to *Cooper* v. *Macdonald* (3) and *Cruse's* Digest (4).]

Cottrell, for the second demurrer, referred to *Winter* v. *Winter* (5).

Warmington, in support of the statement of claim:—

The whole question turns upon the construction of the 33rd section of the *Wills Act*. The object of that section is to give effect to the testator's will, under which the gift, which would otherwise become the subject of lapse, occurs; and the result, therefore, in this case, is, that the daughter dying in the testator's lifetime had her estate augmented by the devise made to her by the testator, that is to say, the subject of the devise fell into the estate of the daughter, and she could have disposed of it if she had had power to do so: *Pickersgill* v. *Rodger* (6). If, therefore, she had such an interest in the property that she could have disposed of it, she was so seised of it as to have given her husband an inchoate right to curtesy.

[JESSEL, M.R.:—In *Gibbins* v. *Eyden* (7), Vice-Chancellor *Malins* decided that there can be no inchoate right to curtesy till the wife becomes entitled to an estate of inheritance in possession, and in this case in no sense can the wife be said to have been seised of an estate of inheritance in possession during the coverture.]

I submit that by the operation of the 33rd section of the Act the wife had seisin for all purposes, and therefore such a seisin as to give her husband a title as tenant by the curtesy. The operation of that section is to place the daughter in exactly the same position as if she had survived her father, and the devise must be taken in law to pass through her, and that being so, it formed part of the estate of which she died seised. *The Executors of Perry* v. *The Queen* (1) is a clear decision in my favour on this point.

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(1) 32 L. J. (Ch.) 359; S. C. 1 N. R. 507. 9 Jur N.S. 568.

(2) 3 Hare, 157.

(3) 7 Ch. D. 288.

(4) Ed. 1835, vol. i. p. 140.

(5) 5 Hare, 306.

(6) 5 Ch. D. 163.

(7) Law Rep. 7 Eq. 371.

I submit that the Plaintiff is entitled for his life as tenant by the curtesy, and that these demurrers must be overruled.

Macaskie, in reply.

JESSEL, M.R.:—

This is undoubtedly a new case, and, like most new cases under the statute, in my opinion it is one of those cases which was not foreseen by the draftsman, or, as we generally say, the Legislature; and, therefore, one has to find out the meaning of the Legislature, or, of the Act of Parliament, from the words used and from the general purview and intent of the statute.

Now, decisions help one to a certain extent. In the first place, it is settled by *Johnson* v. *Johnson* (2), and a great many other authorities which have followed *Johnson* v. *Johnson*, that a gift to a child, though dependent on the fact of there being issue of the devisee living at the testator's death, is not a gift to the issue, but is to take effect exactly as if the actual death of the devisee had happened immediately after the death of the testator, and with all the consequences.

I cannot do better than quote the words of Vice-Chancellor *Wigram* at page 163 of the report of that case. He says: "I stated my opinion at the conclusion of the argument that upon the construction of the 33rd section of the statute 1 Vict. c. 26, taken alone, a legatee within that section would take the same provision under his father's will, and with the same powers and incidents of property, as if he had actually survived the testator." Then he goes on to consider another question, which is a very curious one, and which was settled by that case—whether the words of the 3rd section, which only enable a testator to dispose of by will all that to which he was entitled at the time of his death, are extended constructively by the operation of the 33rd section, so as to make him entitled at the time of his death, and therefore to make the property pass by his will; and he held that it did. No doubt, literally, he was not entitled at the time of his death, but he said it postponed his death, so to say, for this purpose, and in that way made him entitled at the time of his death. It put his death a day after the other testator's death, and, therefore, if it was to take effect as if his death had happened immediately afterwards, it took effect with all its incidents, and among other incidents was the right to dispose of the property he was entitled to at the time of his death by his will.

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(1) Law Rep. 4 Ex. 27.

(2) 3 Hare, 157.

That, therefore, decides that the property is either disposable of by will or descends in the case of intestacy as in this case. That being so, then there is no doubt that the person to take would be the heir of the devisee, and, under the *Inheritance Act*, he takes as purchaser. All that is clear enough. But in the case of husband and wife, it is by no means so clear. In the case of a husband, this being, as it is, a devise of legal estate, with a superadded direction as to separate use which does not affect the devise of the legal estate, as I held in *Cooper* v. *Macdonald* (1), which was affirmed on appeal, the husband would take under his legal rights without those legal rights being cut down by the superadded direction as to separate use.

Then the question arises whether, according to the law of curtesy as to legal estates, the husband is entitled to curtesy at all. If you read the words of the section literally and read them as they have been read in the cases cited, it will be exactly the same as if the lady had died immediately after her father (the words of the statute are "immediately after"), and then the question comes as to whether the husband could have taken an estate by the curtesy. Now, I consider it is settled law that, as a general rule, the husband could not take an estate by the curtesy in property which was the fee simple of the wife in possession, unless there had been an entry or something equivalent to an entry—that is, a reception of rent to entitle the wife to be described as being seised in fee of the property. If it descended to the wife, for instance, and the husband did not enter in her

(1) 7 Ch. D. 288.

right before her death, the husband did not get an estate by the curtesy; but, though that was settled law, there was a reason for the law—it was considered to be the husband's own fault for not entering. He had an estate during the coverture and he had not taken due advantage of his opportunities of becoming seised; and, where he could not become seised from the nature of the estate, a seisin in law was sufficient, and he was not, therefore, deprived of his estate by the curtesy, because he could not possibly have obtained a legal seisin by any act of his own.

Now, let us apply that doctrine to the case in question. The wife having died in the testator's lifetime, by no possible means could the husband have obtained seisin; he could not obtain seisin during the lifetime of the testator because the estate was not in his wife; and he could not have obtained seisin even under the section, because there was only a moment that intervened. It was as if she had died immediately after, that is, a moment after. During that moment, he could not have obtained seisin; there was not time enough; and, therefore, by no possible means could he have obtained seisin. Therefore, if the rule was really a punishment on the husband for his negligence in not obtaining seisin where seisin could have been obtained by some act of his, and if that rule was modified where by no possible means could he have obtained seisin, it appears to me that the same doctrine should apply in a case like this, where, by reason of the peculiarity of the estate of the wife, there was no possibility of obtaining such seisin.

Now, that that was the law I think is pretty plain if you look at what, perhaps, is the best authority on the subject—*Coke* upon *Littleton* (1). At 29a there is this passage: "And first of what seisin a man shall be tenant by the curtesy. There is in law a twofold seisin, viz., a seisin in deed, and a seisin in law. And here *Littleton* intendeth a seisin in deed, if it may be attained unto." Now those are not the words of *Littleton*, but *Littleton* says this at sect. 35: "Tenant by the curtesy of *England* is, where a man taketh a wife seised in fee simple or in fee tail general, or seised as heir in tail especial and hath issue by the same wife male or female born alive albeit the issue after dieth or liveth, yet, if the wife dies, the husband shall hold the land during his life by the law of *England*." So that what I read before is not *Littleton*, but *Coke's* comment upon *Littleton*. He says, "If it may be attained unto." It is not an absolute rule, therefore, but only if he can get seisin. Now, here is the example—"As if a man dieth seised of lands in fee simple or fee tail general, and these lands descend to his daughter, and she taketh a husband and hath issue, and dieth before any entry, the husband shall not be tenant by the curtesy and yet in this case she had a seisin in law; but if she or her husband had during her life entered, he should have been tenant by the curtesy. A man seised of an advowson or rent in fee hath issue a daughter, who is married and hath issue and dieth seised, the wife, before the rent became due or the church became void, dieth, she had but a seisin in law, and yet he shall be tenant by the curtesy, because he could by no industry attain to any other seisin. *Et impotentia excusat legem*."

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(1) 19th Ed. (1832).

That exactly applies here. There is no possible means by which the husband could have obtained seisin *et impotentia excusat legem;* consequently, the seisin is not required.

That being my opinion, I think the husband is entitled for his life as tenant by the curtesy, and, therefore, the demurrers will be overruled. I suppose the costs are already provided for.

Warmington:—The costs of all parties are to be paid out of the rents.

Solicitors: *Charles Rogers, Sons, & Russell; William Hawkins Herbert; Blanco White.*

G. M.

M. R.
1880
July 29.

EMMA SILVER MINING COMPANY *v.* GRANT.

[1877 E. 103.]

Company—Promoter—Secret Profit—Bankruptcy—Discharge—Proof in Bankruptcy—"Unliquidated Damages"—"Contract"—"Debt incurred by means of Fraud or Breach of Trust"—Bankruptcy Act, 1869, *ss.* 31, 49.

QBD 455
21 ChD 522
524
11 QBD 353

Under a secret agreement between the vendors of a mine and *G.*, a financial agent who was promoting and afterwards formed a company for its purchase, *G.* received from the vendors part of the purchase-money without the knowledge of the company. In an action by the company to make *G.* liable for the amount of the secret profit he had so made, a specific sum was found due from him to the company upon that footing. *G.* then presented a petition for liquidation, and his creditors passed a resolution for liquidation of his affairs by arrangement; a trustee was appointed of his estate, and he obtained his certificate of discharge:—

Held, that the company were to be at liberty to go in and prove against *G.*'s estate as creditors for the sum found due from him in the action, it not being a "demand in the nature of unliquidated damages arising otherwise than by reason of a contract."

Held, also, that the debt so due from *G.* was incurred by "fraud" and also "breach of trust" within sect. 49 of the *Bankruptcy Act*, 1869, and that, accordingly, *G.* was not released from such debt by his discharge; and he was thereupon ordered personally to pay the debt to the company, or so much thereof as should not be received by the company under the liquidation.

THE issues directed in this action having been tried and determined, as already reported (1), the Plaintiff company now moved for judgment under Rules of Court, 1875, Order XL., rule 7.

For the purpose of the present report it is only necessary to state the following additional facts.

On the 7th of March, 1879, Messrs. *Albert* and *Maurice Grant* presented a joint petition for liquidation of their affairs by arrangement. On the 27th of March, 1879, the joint creditors passed a resolution for liquidation by arrangement, and Mr. *James Waddell* was appointed trustee of the joint property of the debtors, who were thereupon discharged from the claims of the joint creditors.

On the 31st of March, 1879, the separate creditors of *Albert Grant* passed a similar resolution, *Waddell* being appointed trustee of his separate property, whereupon he was discharged from the claims of his separate creditors, and on the 19th of April, 1879, duly obtained his certificate of discharge.

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(1) 11 Ch. D. 918.

Waddell having been joined as a Defendant to the action by order of revivor, the Plaintiff company, on the 24th of February, 1880, served the Defendants *Albert Grant* and *Waddell* with the following notice of motion: That in accordance with the finding of the Court on the 26th of February, 1879, on the trial of the issues, the Plaintiffs might be admitted to prove against the estate of the Defendant *Albert Grant*, as creditors for the sum of £137,611 3*s.* 5*d.*, being the amount which, at the date of the liquidation by arrangement of the affairs of the said *Albert Grant*, appeared from the same finding to be due from him to the Plaintiffs in respect of the sum of £108,188 6*s.* 11*d.* received by him as a promoter of the Plaintiff company, as therein mentioned, and interest on the same as in the said finding specified, and for the costs of and incidental to the trial of the said issues and the application for such trial, and the costs of the present application and of so much of the said action as related to the questions raised by such issues (including the costs of the appeal from the order of the 22nd of November, 1878), after deducting from and setting off against the said sum of £137,611 3*s.* 5*d.*, and the said costs, the costs of the Defendant *Albert Grant* of so much of the action as related to any cause of action other than that covered by the said issues: and that it might be declared that the said debt of £137,611 3*s.* 5*d.* due from the Defendant *Albert Grant* to the Plaintiffs was incurred by means of fraud or breach of trust, and that the said *Albert Grant* had not been released therefrom by his discharge in the said liquidation; and that the said *Albert Grant* might be accordingly ordered to pay to the Plaintiffs the said sum of £137,611 3*s.* 5*d.*, or so much thereof as should not be received by the Plaintiffs under the said liquidation.

Davey, Q.C., and *Grosvenor Woods*, for the Plaintiff company:—

By our notice of motion we ask, first, that we may be admitted to prove against *Albert Grant's* estate in the liquidation for the amount found by the Court to be due from him to us: and, secondly, for an order for payment against him personally, notwithstanding his discharge. The second part of the notice of motion is based on sect. 49 of the *Bankruptcy Act,* 1869, which says that "An order of discharge shall not release the bankrupt from any debt or liability incurred by means of any fraud or breach of trust, nor from any debt or liability whereof he has obtained forbearance by any fraud." We submit, as the result of your Lordship's former judgment, that the debt in the present case must be considered as having been incurred by means of fraud, and also by means of breach of trust, *Grant* being a promoter of the company and therefore standing in a fiduciary position towards it.

[In addition to the cases referred to in the former report, they also cited *Panama and South Pacific Telegraph Company* v. *India Rubber, Gutta Percha, and Telegraph Works Company* (1); *In re Forest of Dean Coal Mining Company* (2).]

[They were stopped by the Court.]

Whitehorne, for *Waddell*:—

I submit that the motion, so far as it relates to the proof in bankruptcy, is misconceived; for, in the first place, it is wrong in point of form, a Judge of the Chancery Division having no jurisdiction to give leave to prove against an estate which is being administered by the Court of Bankruptcy.

[It was admitted on behalf of the Plaintiff company that the notice of motion should have asked to be "at liberty to go in and prove," instead of "admitted to prove."]

Secondly, I submit that the debt is not one that is provable in bankruptcy. The 31st section of the *Bankruptcy Act,* 1869, expressly enacts that "demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise shall not be provable in bankruptcy." The present demand is not one arising under "a contract or promise": it is in the nature of damages recovered in an action of tort founded on fraud and misrepresentation, and as such is not provable in bankruptcy unless judgment is signed before the adjudication, even though the verdict has been obtained: *In re Newman* (3);

(1) Law Rep. 10 Ch. 515.

(2) 10 Ch. D. 450.

(3) 3 Ch. D. 494.

Ex parte Baum (1). Your Lordship's judgment on the former occasion proceeded expressly on the ground of fraud and misrepresentation, not of contract.

Benjamin, Q.C., and *Everitt*, for the Defendant, *Albert Grant* :—We submit that in pursuance of the order made by the Court of Appeal on the 14th of February, 1879 (2), an order should now be made discontinuing the action except so far as it is covered by the issues which have been already tried.

[*Davey*, Q.C., for the Plaintiff company, assented to this course, whereupon his Lordship said he should direct the discontinuance of the whole of the action except so much as was covered by the issues.]

Now, as regards that part of the present notice of motion which seeks to establish a personal liability against the Defendant, *Albert Grant*. We submit that, while your Lordship held that, under the circumstances of the case, the Defendant *Grant*, as promoter of the company, was liable to repay the profits in question, you appear from your judgment (3) to have considered that he received these profits *bonâ fide*, under the belief, however erroneous, that he was entitled to them; and your Lordship decided that he was entitled to be credited, out of what he had received, with all the money he had spent in promoting the company, and that he was only liable to repay the balance. Your Lordship accordingly found, as a verdict, that he was liable, as promoter, for the balance, with interest at 4 per cent., and we admit that the Plaintiff company is entitled to a judgment accordingly; but the company now asks a declaration that this debt so due from the Defendant *Grant* was incurred by means of fraud or breach of trust, and that he was not released by his discharge. The question then is, Has he "incurred any liability by means of fraud or breach of trust" within the meaning of sect. 49 of the *Bankruptcy Act*, 1869? The first inquiry is, Has he committed a fraud because, as agent, he has made a profit? That profit would have been a legitimate profit had it been

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(1) Law Rep. 9 Ch. 673.

(2) 11 Ch. D. 931.

(3) 11 Ch. D. 937, 938.

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revealed, that is to say, had the two agreements of the 2nd of November and 5th of December, 1871, been duly disclosed to the company: that is to be inferred from your Lordship's finding. The only reason for holding *Grant* responsible is that he did not disclose the agreements under which he had received the money. The ground upon which it has been decided that money received under such circumstances must be restored is not that the receipt of the money is a fraud, but that an agent is not entitled to receive a profit. This case is not one in which the company could have purchased for a less sum than they actually did. It cannot be said that they could have bought without *Grant's* intervention: in fact it is clear that without his assistance they could not have bought at all. The profit that he made in enabling them to secure the property cannot be said to have been made by fraud: we submit that his liability to repay it is in the nature of an ordinary debt due by an agent in respect of money had and received by way of secret profit: *Imperial Mercantile Credit Association* v. *Coleman* (1).

Then, was this a "liability incurred by means of a breach of trust"? It must, no doubt, be considered as now settled by *Erlanger* v. *New Sombrero Phosphate Company* (2)—though the doctrine was laid down in that case for the first time, and not until after *Grant* became engaged in the transaction in question—that a promoter stands in a fiduciary relation towards the company he is promoting: that is to say, he is to be treated as a constructive trustee. But we submit that sect. 49 of the *Bankruptcy Act*, 1869, has reference, not to a constructive trust, but to an express trust—to the case, that is, of an express trustee who has received money of his *cestuis que trust* and has not accounted. That is not the case here. *Grant's* position is somewhat analogous to that of a commission merchant who sells goods and receives money for a correspondent, to whom he stands in the relation of debtor, not trustee. If a commission merchant were trustee of the moneys he receives for his principal, he could never get his discharge, in case of bankruptcy, except on the terms of his paying his principal in full.

[Upon the question of principal and agent, *Diplock* v. *Black-*

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(1) Law Rep. 6 H. L. 189.

(2) 3 App. Cas. 1218.

burn (1), *Morison* v. *Thompson* (2), and *Williamson* v. *Barbour* (3) were referred to.]

JESSEL, M.R.:—

There are two points to be decided in this case as regards the Defendant *Albert Grant.* The first point is whether the transaction in question was a fraud; and the second is whether it was a breach of trust within the purview of the *Bankruptcy Act,* 1869.

As regards the first question, I will put the following case: An agent for the purchaser of a horse, say his groom, goes to the vendor of the horse and says, "What will you take for it?" The vendor says, "I will take £100." "No," says the agent, "make it £120, and we will divide the £20; I will take £10 and you will take £10: make out a contract for the sale at £120." The vendor, who is as much a rogue as the agent, agrees to this, and makes out a contract for £120. Thereupon the agent goes to the purchaser and says, "I had to give £120 for the horse: I could not get it for less: here is the receipt;" and he induces the purchaser to hand him £120, of which he pays £110 to the vendor and retains £10 for himself. Is that transaction to be characterised as a fraud on the purchaser, or is it not? In my opinion it is a clear fraud, and I think that even the ingenuity of the very eminent counsel who addressed me on behalf of Mr. *Albert Grant* could not suggest any definition of a fraud which would not include such a transaction. Now that is substantially the case I have to deal with here. Messrs. *Albert* and *Maurice Grant,* as the agents of the *Emma Mining Company* (for that was their position; they were what are called "promoters," they formed the company and were fiduciary agents) agreed with Messrs. *Park* and *Stewart* for the purchase of the mine. They nominally purchased for a million, and they agreed to divide something over £200,000 between themselves and the vendors, by which they, the *Grants,* pocketed upwards of £100,000. How does that transaction differ from the case I have put, except that the sums in the one case are much larger than those in the other. You have only to substitute "mine" for "horse," "£100,000" for "£10," and these great financial agents for the groom, and the two cases are substantially identical. The present transaction is one between man and man, which, in my opinion, is wholly undistinguishable from the illustration I have ventured to put. It appears to me there is no other word to characterise the transaction except fraud.

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(1) 3 Camp. 43.

(2) Law Rep. 9 Q. B. 480, 485, 486.

(3) 9 Ch. D. 529.

It is said, however, that Mr. *Albert Grant* did not believe it to be a fraud: that may be so. A man may commit a fraud without believing it to be a fraud, that is, without believing it to be a fraud for which he can be held responsible in law; though I am by no means convinced that even Mr. *Albert Grant* could have treated this originally as an equitable or moral transaction. But the question is, What has his belief got to do with it? His belief was, as he told me on the former occasion (and I have no reason to suppose his statement not to be true), that a promoter was not, in law, an agent. That was the foundation of his belief of a right to retain the money. He did not tell me—in fact he is too acute a man to have told me—that if he had only been an agent he would have had a right to pocket the profit: that is a totally different question. His ignorance at that time was as to his legal position as an agent; but that, of course, could make no difference in a Court of Law. The mere fact of a man not being aware that the law could reach him would not prevent his being convicted in a criminal Court. A man must take the consequences of his acts, and he cannot be allowed in a Court of Justice to say he had failed to estimate correctly either their moral or their legal bearings. The first point appears to me, therefore, clear.

The other point is, I must say, much more arguable, and is one upon which there is much more difficulty. It is not absolutely necessary for me now to decide the point; but it has not been my habit, when a point has been properly discussed, to refrain from expressing an opinion on it, merely because I have decided another point which happens to be conclusive of the case before me. The question is whether this transaction is a breach of trust within the *Bankruptcy Act*, 1869. In the first place, I see no reason for construing the words "breach of trust" in that Act, otherwise than in their ordinary sense. It must be recollected there was another Act passed at the same time known as the *Debtors Act*, 1869, for the abolition of imprisonment for debt.

Certain persons in a fiduciary position who misappropriated money, were made liable to the penal sections of that Act. The two Acts were passed on the same day and related to the same subject; and there can be no reason for imagining that the persons in a fiduciary position in the one Act were to be a different class from the persons in a fiduciary position in the other. I see no reason for exempting the bankrupt when you would not exempt the insolvent from penal consequences.

It is suggested that to use the words "breach of trust" in that sense—that is, as meaning breach of constructive trust as well as breach of express trust—might involve divers merchants and directors in the city of *London*, or elsewhere, in the difficulty of having to pay their debts in full instead of escaping by paying a small dividend and recommencing their career of fraud. I do not think that is a sufficient reason. It has been suggested that an agent who for his own purposes sells property, the proceeds of which he is liable to keep intact for his principal and hand over in specie, is not to be treated as guilty of a breach of trust under any circumstances. I can only say, Why not? Morally, it is as great an offence as if he had consols handed to him as a trustee, and he sold out the consols and applied the proceeds to his own use. I can conceive no difference between the groom who, having a horse entrusted to him to sell, and being authorized to receive the purchase-money—say £50—which he is told to bring to his employer, runs away with the £50 and spends it in dissipation, and the man who being a trustee of £50 in consols, which happens to stand in his name, sells it and applies the proceeds to his own purposes. Neither morally nor legally is there any difference.

There does not appear to me any reason in the world for not giving the words "breach of trust" in the *Bankruptcy Act* their proper technical legal meaning. If an agent, either buying or selling, misuses or abuses the confidence reposed in him with a view to retaining the profits for himself, he commits a breach of trust. If you entrust an agent with £100 to buy a bale of goods, and he lays out £90 and pockets £10, and tells you he has laid out the £100, that is a breach of trust as regards the £10 which he has not applied according to the trust. If, on the other hand, he sells a bale of goods for you for £100, and tells you he has sold it for £90 and pockets the £10, he is guilty of a breach of trust as regards the £10. Why a Judge should be asked to exercise his ingenuity to allow a man to escape the consequences of such acts I do not know. The right mode of reading the section is the literal mode of reading it; and I so read it. Consequently I hold that Mr. *Albert Grant* has, in the present case, not only been guilty of fraud, but has also been guilty of a breach of trust.

As regards the Defendant, the trustee in bankruptcy, the argument which was addressed to me, that the Plaintiff company could not prove for the amount in question, has not met with my approbation. The Act of Parliament does not allow any proof for unliquidated damages unless they arise from a contract. In the first place, I do not consider this sum of money to be in the nature of unliquidated damages at all; because it is the sum received by Mr. *Albert Grant* for which he is liable to account. Besides, this sum of money does arise from a contract—that is to say, a contract of agency, or promotion, or trusteeship—call it what you like. Under that contract he became liable for the sum he received in that character; and he is liable to account for it by reason of that contract. It seems to me a clear case arising from contract. The liberty given in the old form of decree in the Court of Chancery, to prove against the estate of a bankrupt trustee, was always put on the ground that the trustee contracted to perform his trust, and therefore his liability was always treated as a liability arising from a contract, and not from what I will call pure tort. Our law got into a little confusion in that respect—a confusion now happily got rid of: I mean the confusion between tort and contract. That arose from a very curious circumstance. There was an option sometimes given to the plaintiff to sue either in tort or contract on the same transaction, and that led to a confounding of the form of action with the nature of the remedy, which are totally different things. There was, as I have said, an option to bring either form of action, although, from the nature of the case, the demand must have arisen from a contract.

There will be judgment against the Defendant, the trustee in bankruptcy, in the terms of the notice of motion, except that the Plaintiff company "is to be at liberty to go in and prove" under the liquidation for the sums therein mentioned: the trustee to

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take his costs out of his own estate. There will also be a declaration against the Defendant *Albert Grant* that the debt found due from him on the issues was incurred by means of fraud and breach of trust, and judgment for payment by him of the amount to the Plaintiff company. The action will be discontinued except to the extent covered by this judgment.

Solicitors: *Snell & Greenip; Michael Abrahams & Co.*

G. I. F. C.

V.-C. B.
1881
March 2.

FORSTER *v.* PATTERSON.

[1879 F. 194.]

Mortgage—Mortgagee in Possession—Redemption Action—Limitation—Disabilities—Statute of Limitations (37 & 38 *Vict. c.* 57), s. 7.

Under the *Real Property Limitation Act*, 1874, the twelve years' bar to a redemption suit from the time when the mortgagee took possession, or from the last written acknowledgment, is absolute, and not to be extended by reason of any disability of the mortgagor.

BY an indenture dated the 25th of July, 1857, a copyhold estate was mortgaged by *William Forster* to the Defendant *William Patterson*, and on the 27th of August, 1857, the Defendant was admitted tenant to the copyholds according to the custom of the manor.

On the 5th of February, 1860, *William Forster* died intestate, leaving the Plaintiff *Margaret Forster* his widow, and two daughters, the Plaintiffs *Elspeth Annan Agnes*, wife of *Thomas Reid*, and *Elizabeth*, wife of *James Hamilton*, his only surviving issue. By the custom of the manor the widow was entitled to freebench.

In 1861 the Defendant went into possession, and had remained in undisturbed possession ever since, without having received payment of the mortgage debt or any part thereof, or any interest upon the debt or any part thereof, and without having given any acknowledgment in writing to the mortgagor, or to any one claiming through him.

The writ in the action, which was for the ordinary redemption decree, was issued on the 29th of October, 1879.

The Defendant pleaded the *Statute of Limitations*, and the Plaintiffs in reply pleaded as follows: "From the time when a right to bring an action to redeem the said mortgaged premises first accrued to the Plaintiffs (other than the Plaintiff *Margaret Forster*), up to the present time (28th January, 1880), or up to a time within the six years immediately preceding the beginning of the action, the Plaintiffs (other than the Plaintiff *Margaret Forster*) laboured continuously under one or more of the disabilities mentioned in the *Real Property Limitation Act*, 1874, and other Statutes of Limitation."

The Plaintiffs joined issue.

The only disability relied on at the hearing was the marriage of the female Plaintiffs (other than *Margaret Forster*).

Macaskie (Sir *H. Jackson*, Q.C., with him), for the Plaintiffs:—

Before the passing of 3 & 4 Will. 4, c. 27 (24th of July, 1833), Courts of Equity, acting by analogy to the then statute law, used to apply the disability extension to the limitation of redemption suits. Then came the statute, which first of all, by the interpretation clause (sect. 1), declared that "land" shall comprise "all corporeal hereditaments whatsoever"; then, by sect. 16, enacted that savings in case of disability should extend to actions "to recover any land or rent"; and finally, by sect. 28, made twenty years' possession an absolute bar in the case of redemption suits. *Casborne* v. *Scarfe* (1) decided that an equity of redemption is an estate in the land, and that has been since upheld: *Sinclair* v. *Jackson* (2); *Du Vigier* v. *Lee* (3). The sections of the statute by which this action is governed, namely, the *Real Property Limitation Act*, 1874 (37 & 38 Vict. c. 57), corresponding to the 16th and the 28th of the former Act, are the 3rd and the 7th. The 3rd section contains the same words "to recover any land or rent"; and the 7th substitutes twelve years for twenty. The Plaintiffs' contention is, that this is an action "to recover land" within the 3rd section, and hence that they are entitled to claim the protection of the section. The 24th section of the Act of 1833, whereby the period of limitation of suits in equity is made the same as that of actions at law, the 25th, relating to express trusts, and the 26th, relating to concealed fraud, are still unrepealed. If the 25th and 26th sections of the Act of 1833 still apply to redemption suits, why should not the disability clause also apply?

In *Young* v. *Lord Waterpark* (4), Lord *Lyndhurst*, C., affirmed a judgment of Sir *L. Shadwell*, V.C.E., deciding that the 40th section of the Act of 1833, the "charges and legacies" clause, has no application to the case of trustee and *cestui que trust;* in other words, that the 25th section controls the 40th; and in *Cox* v. *Dolman* (1) Lord *St. Leonards,* C., held that the 42nd clause of the Act of 1833, the "arrears of rent or interest" clause, was controlled by the same 25th section.

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(1) 1 Atk. 603, 605.

(2) 17 Beav. 405, 410.

(3) 2 Hare, 326, 334, 335.

(4) 13 Sim. 204; 15 L. J. (Ch.) 63.

The view that the disability clause of the statute must be read into the mortgagor and mortgagee clause is supported by the following text-writers: *Fisher* on Mortgages (2); *Coote* on Mortgages (3); *Banning* on Statutes of Limitation (4).

The case of *Kinsman* v. *Rouse* (5), before the Master of the Rolls, seems to have no application to the present.

The disability clause was intended to remedy hardship, and the statute will be construed favourably to persons who are under disability.

Hemming, Q.C., and *Methold,* for the Defendants:—

The case is simply one of construction; considerations of possible hardship are not admissible.

[BACON, V.C.:—I quite agree; with all respect to learned writers, I owe more than respect, I owe obedience to the law, and must be guided by that alone.]

The language of the Legislature is plain. The statute says that whatever relief there may be in other cases, as to that of mortgagor and mortgagee the limitation of years shall be an absolute bar.

Lord *St. Leonards* remarks (6): "There is, it should be observed, no saving for disabilities of the mortgagor or his heirs, in regard to the bar created by sect. 28."

The point has been quite recently decided by the Master of the Rolls in *Kinsman* v. *Rouse.*

The marginal note of *Raffety* v. *King* (7) seems to shew what was the state of the law before the Statute of 1833; but it must be admitted that the statement is not borne out by the judgment of the Court, as reported. *Harrison* v. *Hollins* (1) shews that the twenty years' bar would run against a remainderman.

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(1) 2 D. M. & G. 592.
(2) 3rd Ed. pl. 1204, p. 742.
(3) 4th Ed. by Mackeson, p. 936.
(4) Page 173.
(5) *Ante,* p. 104.
(6) R. Prop. Statutes, 2nd Ed. p. 118.
(7) 1 Keen, 601.

Macaskie, in reply.

BACON, V.C. :—

I cannot say I entertain the shadow of a doubt on this point; and I say so, after having listened with the utmost respect and attention to the ingenious and elaborate argument which has been addressed to me by Mr. *Mackaskie.*

In reading statutes no doubt the order in which the clauses are arranged deserves attention—no doubt the interpretation clause should be attended to—but if the *Statute of Limitations* be read, as it must be read, as one entire thing, there can be no reasonable doubt as to what the intention of the Legislature was. Having dealt with the general subject of actions in an earlier clause, the Legislature considered that there remained another fertile source of litigation, especially in this country where mortgages are so frequent, and having saved the rights of persons under disability in cases to which such saving is properly applicable, the Act proceeds to deal with the subject of mortgages. And that section contains no reservation in favour of persons under disability. It would be unreasonable and unjust if I were to read into this particular section the provisions of an earlier and more general section.

It is not for me to say what is the policy of the law or what were the intentions of the Legislature in enacting this section. But amongst other speculations, I might imagine, though I am not at liberty to do so, that considering what the position of a mortgagee who has entered into possession is—considering what he may have done, and what risks he runs, the Legislature may have resolved that he should be exempt from the privileges which attach to disability in other cases. Mortgagees in possession often lay out large sums of money in improvements, and the Legislature may have determined to say to him, "Do what you will—deal with the property in any way you please and for any length of time, after a fixed period of years has elapsed, you shall not have it wrested out of your hand." Whether such was the intention or not, I do not speculate. I only say it might have been so. But I find this, that as to the question of what is to be the limitation of action between mortgagor and mortgagee, it is laid down that the twenty years' rule shall apply, and that there shall be no exception in cases of disability. Nor can I adopt the course to which I have been invited, of reading one clause into another in order to destroy the effect of that which has been rendered plain and distinct by express enactment.

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(1) 1 S. & S. 471.

That the point has not been lost sight of by the Legislature is plain, because, it having been thought that twenty years was too long a period during which the right should be permitted to be put in force, the enactment was repealed, and a new law substituting twelve for twenty years has been re-enacted in practically the same terms. I am not at liberty to disregard this circumstance.

Then it has been said that it is hard that mortgagors under disability should be deprived of their property. To that the answer is, that there is no choice left in the matter. The statute has declared that after twelve years, however able, or however disabled you may have been, you cannot redeem your estate.

The statement of law from Lord *St. Leonards*' work that has been referred to appears to have been made by him without the slightest hesitation. He speaks of the doctrine as a perfectly settled thing. After going through the whole of the provisions of statute law with regard to limitation of actions, he adds this for the instruction of the reader. And there can be no doubt that the construction of the new statute must follow that of the old.

In my opinion there is no doubt about the matter. Judgment must be for the Defendant, and if he insists upon it, with costs.

Solicitors: *Shum & Co.*, agents for *John Dunlop, Berwick-on-Tweed; Fluker*, agent for *R. B. Weatherhead, Berwick-on-Tweed.*

J. B. D.

EDISON TELEPHONE COMPANY *v.* INDIA RUBBER COMPANY.

V.-C. B.
1881
March 11.

[1880 E. 37.]

Patent—Amended Particulars of Objection—15 & 16 *Vict. c.* 83, *s.* 41—*Costs—Form of Order.*

In granting the defendant in a patent action after issue joined, and a day has been fixed for the hearing, leave to amend his particulars of objection, the Court will place the plaintiff in the same position as to discontinuing the action, or disclaiming a portion of his invention, as he would have been if the original particulars of objection had contained the new instances of prior publication proposed to be introduced by amendment; and accordingly all costs incurred by the plaintiff subsequently to the delivery of the original particulars of objection will be ordered to be paid to him by the defendant in case he elects, within a time fixed by the order, to discontinue his action.

Form of order.

ADJOURNED SUMMONS.

Aston, Q.C. (*Davey,* Q.C., and *Stirling,* with him), on behalf of the Defendants, applied for liberty to reamend their statement of defence delivered in this action (to restrain an alleged infringement of the Plaintiffs' patent for telephone transmitters), and for liberty to amend their particulars of objection by stating particulars of publication of some of the inventions claimed by the Plaintiffs' specification prior to the date of the letters patent (30th July, 1877), and which, as such, ought to be used by the Defendants as evidence in support of their defence in the action.

The writ in the action was issued on the 5th of March, 1880, and the statement of claim and particulars of breaches were delivered on the 19th of March, 1880. The Defendants' statement of defence and particulars of objection were delivered in June, 1880. The patent having been assigned by the Plaintiffs, the *Edison Telephone Company*, to the *United Telephone Company*, in June, 1880, the writ and statement of claim were amended by joining the *United Telephone Company* as co-Plaintiffs. The statement of claim was accordingly amended and delivered on the 7th of August, 1880. An amended statement of defence was delivered on the 1st of November, 1880. Issue was joined, and notice of trial given on the 9th of November, 1880, and the hearing was ultimately fixed, with the consent of the Defendants, for the 15th of March, 1881.

On the 26th of February, after the day had been fixed for the hearing, the Defendants' solicitors took out this summons for leave to deliver amended particulars of objection by adding references to articles contained in the "*English Mechanic and World of Science*" of the 1st of June, 1877, and the 18th of August, 1876; of the "*Telegraphic Journal*" of the 15th of February and the 1st of July, 1877, and the 15th of May, 1876; and to specifications filed in the Great Seal Patent Office in April, 1870, July, 1874, and February, 1876, as instances of prior publication of matters claimed in the Plaintiffs' patent, and stated to have only come to the knowledge of the Defendants' solicitors within the last few days, and not before the 24th of February, 1881.

Kay, Q.C., and *Cozens-Hardy*, for the Plaintiffs:—

As the condition of obtaining this indulgence, which it is in the discretion of the Court, under 15 & 16 Vict. c. 83, s. 41, to grant or refuse, the Defendants must be put upon terms of paying all the costs which have been incurred by the Plaintiffs since the original particulars of objection were delivered, in the event of the Plaintiffs electing to discontinue the action or to disclaim a portion of their patent.

Great expense has been incurred in preparing for the trial; briefs have been delivered, and witnesses have been summoned from *Scotland* and *America*, and much of this expense might have been saved if these new particulars of objection, which spring an entirely new case upon us, had been delivered in the first instance.

Having regard to the nature of the proposed amendments, the Plaintiffs ought to have an opportunity of considering whether they shall disclaim any part of their patent or discontinue their action, and as the Defendants are coming at the last moment for an indulgence, the Plaintiffs are entitled to be put in precisely the same position in which they would have been if these objections had been contained in the original particulars, when they might, without incurring any further costs, have disclaimed, or discon-

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tinued the action if necessary. We ask, therefore, that the order may be made in the terms of *Baird* v. *Moule's Patent Earth Closet Company* (1) (M. R. 3rd Feb., 1876), which was followed in *Aveling* v. *McLaren* (C. P. D. 3rd Dec., 1880), and also by Lord Justice *Bramwell* at Chambers in *Wright* v. *Hitchcock* (Ex. D.).

Aston, in reply:—

We do not controvert the proposition that this is a matter entirely in the discretion of the Court, but in recent cases where that discretion has been exercised the Court has found it more convenient to reserve the question of costs. If the Plaintiffs will at once say that they are prepared to discontinue, then the Court will be in a position to say by whom and under what circumstances the costs should be paid; but otherwise, as in *Penn* v. *Bibby* (1), the order should be made on the terms of our paying the costs of this application, if necessary, but specially reserving any additional costs occasioned by the introduction of the new particulars of objection. The same order was recently made in the *Gas Motor Engine* case (*Otto* v. *Linford*) (before your Lordship on 7th March, 1881). If there had been anything unfair on the part of the Defendants in applying at this period of the case, your Lordship might express your sense of any laches or neglect on their part. But the new information on which we now seek to rely was not obtained until the 24th of February. The Plaintiffs are in no way prejudiced with reference to deciding whether they will discontinue or not, as they have not to make any inquiry, (as would have been the case if the Defendants had sought to put in new particulars of objection alleging instances of prior user in *Scotland* or some equally distant place,) but have only to look at the instances of prior publication we wish to add to those already given, to see whether it is necessary for them to discontinue. We ask for the same order as was made in *Penn* v. *Bibby*.

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(1) The material parts of the order in *Baird* v. *Moule's Patent Earth Closet Company, Limited* (M. R. 3rd February, 1876, A. 231), were as follows:—

Upon motion, &c., on behalf of the Defendants. Let the Plaintiff, within six weeks from the date of this order, elect whether he will discontinue this suit, and if the Plaintiff shall elect to discontinue this suit, and shall give notice thereof to the Defendants within six weeks from the date of this order, refer it to Taxing Master to tax the Defendants their costs up to and including the 23rd of February, 1875 (delivery of the original particulars of objection), and to tax the Plaintiff's costs of this suit subsequently to the said 23rd of February, 1875, to the date of this order, and the Taxing Master is to setoff the costs of the Plaintiff and of the Defendants to be so respectively taxed, and certify to which of them the balance after such set-off is due. And let such balance be paid by the party from whom to the party to whom the same shall be certified to be due. And if the Plaintiff shall not give notice to the Defendants of his discontinuance of this suit within the time aforesaid, let the Defendants be at liberty to add to the particulars of objections to the validity of the Plaintiff's letters patent, &c., which have been already delivered by the Defendants, the following further objections to be relied on by the Defendants at the hearing of this cause, viz. [Particulars of new objections proposed to be introduced by amendment.] And let Defendants *Moule's, &c., Company*, pay to the Plaintiff *A. F. Baird* his costs of this application, to be taxed, &c. Liberty to apply.

In *Aveling* v. *McLaren* (C. P. D., (Master *Francis* at Chambers), 23rd December, 1880), the order was that Defendants be at liberty to amend their particulars of objections by adding thereto a certain specification, and certain specified instances of prior user, &c.; and that Plaintiff should be in the same position as to discontinuing the action as he would have been if the amended objections had been delivered with the defence, and that the costs of and occasioned by the amendment, and costs unnecessarily caused to the Plaintiff by reason of the amendment being made at this late stage, be Plaintiff's costs in any event.

BACON, V.C.:—

I cannot be tempted into any consideration which approaches the merits. This is simply a question of procedure in a patent case. I find an order cited to me from the Rolls which seems applicable to the state of things before me now. Moreover, if it is necessary to say so, it seems highly reasonable that the Plaintiff should have an opportunity of discontinuing if he thinks fit—in short, he has a right to exercise those privileges which the order in *Baird* v. *Moule's Patent Earth Closet Company* (2) granted. I think I must follow that as a precedent upon this matter of practice—I need not repeat that with the merits I have nothing to do. I cannot measure how much the Plaintiff ought to be indulged, or how far the Defendant is justified in coming late, as he does come, in consequence of recent discovery. I have nothing whatever to do with it. I find the practice clearly and distinctly established, and, as I think, with perfect justice. The case of *Penn* v. *Bibby*, I dare say, was rightly decided upon the

(1) Law Rep. 1 Eq. 548, 551.

(2) *Ante*, p. 139, n.

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facts before the Court then, and the argument then urged, but I cannot adopt that as a rule regulating the practice in patent cases. The order must be made in the very terms of the order in *Baird* v. *Moule's Patent Earth Closet Company* (1) (putting in a month instead of six weeks for the period within which the Plaintiff is to elect whether he will discontinue or not). Defendants must pay the costs of this application, and the case will stand over generally, with liberty to either party to apply.

Solicitors: *Waterhouse & Winterbotham; Murray, Hutchins, & Stirling.*

F. G. A. W.

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(1) *Ante*, p. 139, n.

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1881
Feb. 16.

In re EMMET'S ESTATE.
EMMET *v.* EMMET.

[1879 E. 99.]

Trustee and Cestui que Trust—Breach of Trust—Accumulation Clause—Compound Interest—Rate of Interest.

The trustee of a will held a fund upon trust (after the determination of a previous life interest) to transfer and pay the same to a child when and as he should attain twenty-one, with a proviso that in case the child should be under age at the determination of the life interest the income of the fund or any part thereof should or might be applied for or towards his maintenance, education, and advancement, and the surplus, if any, should accumulate to and become part of the fund.

After the child attained twenty-one (the life interest having previously determined), the trustee retained the fund without making any arrangement with the child or explaining to him his rights:—

Held, that the trustee must be taken to have continued to hold the fund after the child attained twenty-one, upon the same trusts and with the same obligations to accumulate as before, and that he was liable to account for the fund with compound interest.

Wilson v. *Peake* (1) distinguished.

Amiss v. *Hall* (2) observed upon.

Part of the fund had been invested at 5 per cent. or other rates of interest upon authorized securities, and the rest of it had been either improperly invested or had not been kept separate from the trustee's own moneys:—

Held, that as to so much of the fund as had been invested at 5 per cent. or any other rate upon authorized securities interest must be calculated at the rate actually yielded; that the rest of the fund must be treated as having been in the trustee's hands uninvested, and that under the circumstances he must be charged with interest thereon calculated at 4 per cent. only.

EDWARD EMMET, by his will, dated in 1833, gave all his real and personal estate unto *John Hardwick* and his (the testator's) brother, *Henry Emmet*, upon trust to let, manage, and improve his real estate, and to convert and invest in the public funds, or on real or leasehold securities in *England*, his personal estate; and during the life of *Henry Emmet* to pay to or permit him to receive the rents of his real estate and the yearly produce of the invested personalty, and after his decease to stand possessed of one equal third part of his real estate and of the moneys

(1) 3 Jur. (N.S.) 155.

(2) 3 Jur. (N.S.) 584.

arising from or the investments of his personal estate, in trust for all and every the children and child of *Henry Emmet*, and if more than one, in equal shares as tenants in common, "the share or shares of such of them as shall be a son or sons to be conveyed, assigned, paid, or transferred to him or them respectively when and as he or they shall respectively attain the age of twenty-one years, and the share or shares of such of them as shall be a daughter or daughters to be conveyed, assigned, paid, or transferred to her or them respectively when and as she or they shall respectively attain the age of twenty-one years or marry" .... "unless such son or sons, or any of them, shall attain such age or marry as aforesaid in my lifetime or in the lifetime of my said brother, and in that case to be paid, assigned, conveyed, or transferred to such son or sons, daughter or daughters so attaining such age or marrying respectively as soon as conveniently may be after my decease and the decease of my said brother. And in case any of the children of my said brother shall be under age at the decease of the survivor of us, my will is that the rents, dividends, interest, and yearly produce of the share or respective shares of such child or children respectively, or any part thereof, shall or may be applied in or for or towards the maintenance, education, and advancement of such child or children respectively, and the surplus, if any, should accumulate to and become part of the original share." The will then contained a provision that the shares of children who being sons should die under twenty-one and without issue, or who being daughters should die under twenty-one without having been married, should accrue to the survivors or others of the children in equal shares; and a declaration of trust of one other third share of his real estate and the moneys arising from and the investments of his personal estate in favour of all and every the children and child of the testator's brother, *G. N. Emmet*, to be equally divided between them, if more than one, as tenants in common, "and the share or shares of such child or children respectively to be conveyed, assigned, paid, or transferred to him, her, or them respectively at the same ages and times and with the like power of advancement and benefit of survivorship and other trusts and powers" as were hereinbefore expressed concerning the children of *Henry Emmet*, or as near thereto as might be and the circumstances of the case would admit. There was also a declaration of trust of the remaining third share in similar terms in favour of the children of the testator's sister *Sarah*, the wife of the said *John Hardwick;* and a gift over, in default of children of *Henry Emmet*, in favour of the children of Mrs. *Hardwick* and *G. N. Emmet*, in equal moities, in terms similar to those of the original gifts.

The testator died in January, 1836, and *Henry Emmet* died a bachelor in 1839.

G. N. Emmet was twice married. By his first marriage he had two sons, viz., the Plaintiff, *C. A. Emmet*, who was born in 1828, and *R. A. Emmet*, who was born in February, 1836. By his second marriage, which took place in 1840, he had five children, four of whom were born before the Plaintiff attained twenty-one.

The Plaintiff attained twenty-one on the 13th of September, 1849. *R. A. Emmet* attained twenty-one on the 7th of February, 1857, and died in July, 1865, having by his will appointed his wife, the Defendant, *Eliza Emmet*, and the Plaintiff his executors, and having giving them all his real and personal estate in trust for his wife during her widowhood, and after her death or marriage (in the events which happened) for the Plaintiff absolutely.

After the death of *Henry Emmet*, *G. N. Emmet* was in the year 1840 appointed in his place to be a trustee of the testator's will, and shortly afterwards the net residue of the testator's estate, which amounted to £6000, was divided into two equal parts, and £3000, representing one of such parts, was paid by *John Hardwick*, the surviving executor, to the Defendant *G. N. Emmet* on account of his children entitled under the testator's will, the other part being retained by *Hardwick* on account of his wife's children. *Hardwick* died in 1856. In July, 1877, the Plaintiff brought this action, alleging that neither he nor his brother *R. A. Emmet* were ever informed, during the life of the latter, of the appointment of their father, *G. N. Emmet*, as trustee, nor that he had received and held a moiety of the testator's estate; that the Plaintiff was not informed of this fact, or of his interest under the testator's will until 1877, when he heard of it incidentally eighteen months before the institution of the action; and that *G. N. Emmet*, though requested, had rendered no account of the trust fund so come to his hands; and the Plaintiff claimed to have the trusts of the testator's will performed, and his estate, so far as it had come to the hands of the Defendant *G. N. Emmet*, administered and duly accounted for, and paid by him with all proper interest and proper rests.

In his defence *G. N. Emmet* alleged that both the Plaintiff and *R. A. Emmet* knew of the payment to him of the £3000, and of the fact of their being interested therein under the testator's will; that in an action of *Emmet* v. *Emmet* (1) it had been decided that upon the true construction of the will the children of his second marriage who were born before the Plaintiff attained twenty-one were entitled to share equally with the Plaintiff in the said £3000, and that he had long since overpaid to the Plaintiff and *R. A. Emmet* the amounts to which they were respectively entitled, according to such construction. And by way of set-off and counter-claim the Defendant stated that he had from time to time made payments and advances to and on account of the Plaintiff and *R. A. Emmet* to amounts as to the former of nearly £2000, and as to the latter of nearly £2500, which he was entitled to set off against their respective shares, and he claimed payment from the Plaintiff, and out of *R. A. Emmet's* estate, of the sum due to him after allowing for the respective shares of the Plaintiff and *R. A. Emmet.*

In answer to interrogatories delivered by the Plaintiff, the Defendant *G. N. Emmet*, who was a solicitor, admitted that the £3000 had been paid over or secured to him in 1840, and that ever since its receipt he "had retained the same, but the same had been invested formerly in the names of the trustees, but not of late years;" and he alleged that the Plaintiff, who came to his office as an articled clerk in 1844, always had access to a copy of the testator's will, and that this will had frequently been the subject of family discussion in which both the Plaintiff and *R. A. Emmet* had taken part, upon the assumption that all the children were entitled to share equally in the £3000; that the said Defendant had always told them they were each entitled thereunder to £500; and that he had, apart from their maintenance, paid the Plaintiff £1684, and to *R. A. Emmet* £2400.

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(1) See *In re Emmet's Estate, Emmet* v. *Emmet*, 13 Ch. D. 484.

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Upon this answer the Plaintiff, on the 22nd of March, 1880, obtained an order directing the Defendant *G. N. Emmet* to deliver an account of all moneys received by him as trustee of the will, shewing when received, and when and how the same had been invested.

The Defendant *G. N. Emmet*, in pursuance of this order, delivered an account on the 11th of May, 1880, shewing that on the 7th of August, 1840, he had received in cash £2850, that of this sum £1000 was invested the same day on a mortgage at 4 per cent., which was paid off in 1873; that £500 was, on the 1st of January, 1842, invested on a mortgage at £5 per cent., which was paid off in June, 1848; that £500 was advanced in March, 1848, upon a reversionary interest in an estate which was afterwards sold by the first mortgagees, so as to leave nothing for subsequent incumbrances, but in respect whereof *G. N. Emmet* held a life policy for £500; that £1500 was advanced in January, 1841, upon a mortgage at £5 per cent., which was paid off in September, 1842, £1000 being reinvested in November, 1842, on mortgage, at £5 per cent., £500 of which was paid off in March, and £500 in December, 1848; the same £1000 being again invested in May, 1849, on a mortgage of £5 per cent., which was paid off in 1860; and the £500 balance of the £1500 was reinvested on a mortgage at £5 per cent. in 1843, which was paid off in June, 1849, when it was reinvested together with £100 of the Defendant's own on a mortgage at £5 per cent., which was paid off in 1853. By his affidavit, made at the time of delivering this account, *G. N. Emmet* stated that the reason why he was unable to bring the account down to a later period and specify the subsequent investments was that he discontinued making specific investments thereof, it having been his intention that all his children should participate equally in his estate.

G. N. Emmet died on the 22nd of July, 1880, and the proceedings in the action having been ordered to be carried on and prosecuted against his executors, the action now came on for trial.

W. F. Robinson, Q.C., and *Wellington Cooper*, for the Plaintiff:—

The Plaintiff is entitled to an account of all moneys received by the Defendant as trustee of the will, and as it was his duty to accumulate under the trust for that purpose, he must be charged with compound interest: *Raphael* v. *Boehm* (1); *Dornford* v. *Dornford* (2); *Pride* v. *Fooks* (3). With regard to any moneys used by the Defendant for his own purposes or mixed by him with his own assets, compound interest must be calculated at the rate of £5 per cent.; and he cannot be heard to say that he has made less: *Jones* v. *Foxall* (4); *Williams* v. *Powell* (5).

W. Pearson, Q.C., and *Rigby*, for the executors of *G. N. Emmet*:—

In order to charge compound interest, the trust for accumulation must be clear, and the Court cannot extend it beyond the time fixed. Here there is no absolute and imperative trust to accumulate, but only a direction to accumulate "the surplus, if any," which shall remain of the income unapplied towards the maintenance, education, and advancement of the child; and there might have been none. Moreover, the direction is not to accumulate "at compound interest," and it only applies during minority. If, therefore, compound interest can be charged at all, it cannot be charged after the Plaintiff attained twenty-one: *Wilson* v. *Peake* (6). But this Court does not act as a Court of penal jurisdiction to punish a trustee for misconduct. As was said by Lord Justice *James*, in *Vyse* v. *Foster* (7), "A man squandering trust money with deliberate dishonesty in profligate extravagance would be answerable for it with 4 per cent.;" and this was simple interest. To charge him with more you must shew that he actually made more. Even where the trust to accumulate is express and imperative, the circumstances of each case will be considered, and there is no stringent rule. A trustee is not charged with annual rests unless the trust is express to accumulate "at compound interest," or the trustee has himself made a profit: *Jones* v. *Foxall*.

In *Amiss* v. *Hall* (8) the trustee was charged with simple interest only at £4 per cent.

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(1) 11 Ves. 92; S. C. on rehearing, 13 Ves. 407.

(2) 12 Ves. 127.

(3) 2 Beav. 430.

(4) 15 Beav. 388.

(5) Ibid. 461.

(6) 3 Jur. (N.S.) 155.

(7) Law Rep. 8 Ch. 309, 333.

(8) 3 Jur. (N.S.) 584.

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[HALL, V.C.:—I do not understand that case, and it is not a satisfactory authority. It may have been a motion on the admissions in the answer for payment of money into Court.]

In *Attorney-General* v. *Alford* (1), Lord *Cranworth* says (2): "In later times, however, the Court has charged executors with 5 per cent. and sometimes with compound interest. This last, however, is a still more modern practice, and in *Raphael* v. *Boehm* (3), where it had been done, Lord *Eldon* said that such terms had never before been inserted, and he hoped never would again be found in any decree." All Lord *Eldon*, in fact, says at the end of his judgment (4) is, that, "considering the nature of the case and the very particular expression as to the computation of interest in this decree," . . . "upon the whole I am not called upon to say that the Master has done wrong in this particular case." Again, in *Burdick* v. *Garrick* (5), it was held that compound interest should only be given against an accounting party when he has actually employed the money in business.

Dundas Gardiner, for *Eliza Emmet*.

Robinson, in reply.

HALL, V.C.:—

The first question which I shall consider is, what is the proper construction and operation of the part of the will which has reference to maintenance and the accumulation of surplus income. The trust is in form an ordinary trust to convey, assign, and transfer to the sons when and as they respectively attain twenty-one, and to the daughters when and as they attain that age or marry with consent. That is the trust of the capital of the trust fund.

The testator then proceeds to say that "in case any of the children of his brother shall be under age" at the death of the tenant for life, the trustees are to deal with the rents or income of the respective shares by applying such rents or income, or any

(1) 4 D. M. & G. 843.
(2) Ibid. 851. 1 Jur. N.S. 362
(3) 11 Ves. 92.
(4) Ibid. 111.
(5) Law Rep. 5 Ch. 233.

part thereof, "in, for, or towards the maintenance, education, or advancement of such child or children respectively, and the surplus, if any, shall accumulate to and become part of the original share."

That trust, enabling the trustees to deal with the income of children who are minors, for their maintenance, education, and advancement, is certainly, upon its proper construction, a trust enduring only for the time which is there specified, *i.e.*, the minority of the child. The trust is one which is called into existence by and only by the fact of a child being under twenty-one, and the state of things which calls the trust into existence also, as I consider, according to the trust itself, measures its duration, because if the child had not been under twenty-one, there would have been no such trust applicable to that particular share. If that be the proper construction, the trust determines on the child attaining twenty-one. So the trust for accumulation of the surplus income is in like manner, according to its frame and construction, applicable only to the income which accrues during the same period, *i.e.*, while a child is under twenty-one. Such is the construction of the instrument itself. There being, then, no trust for accumulation directed beyond the time of minority, we must now consider what is the obligation so created. There is, I consider, a liability and obligation to accumulate the income subject only to such application as might be made of any part of it, less or more, for the specified purposes of maintenance, education, or advancement. The trust comes to an end when a child attains twenty-one. So far I hold the trustee liable to account at compound interest for non-accumulation. Does his liability go beyond the date when a child attains twenty-one? After a child attains twenty-one there is no duty undischarged, except to hand over to the child the fund with the accumulations. The trustee did not so hand it over, nor did he explain to the child that he was entitled to call for and have transferred to him the fund, with the accumulations upon it, in his hands, but he left things in exactly the same position as they were in when the child attained twenty-one. Can I then allow a trustee, under such circumstances, to say, "I am, now that the child has attained twenty-one, holding the fund on a different trust, which does not require any accumulation at all, but merely makes me liable for simple interest; and I can keep it in my hands and use it, and only charge myself with simple interest"? That would be inconsistent with the duties the trustee had undertaken. The accumulations should have gone on until the trustee transferred the fund. In my opinion, if he does not hand it over when he ought to do, he must be taken to be holding it still on the same trust and subject to the same obligations as before. It has been said that Vice-Chancellor *Wood* took a different view in *Wilson* v. *Peake* (1). But that case must be viewed with reference to its own facts, and particularly to the trust for accumulation which came to an end through the operation of the *Thellusson Act;* by which the accumulation could go no further than the twenty-one years, and that was the foundation of the judgment. I have heard nothing about that in this case, nor do I know that any such question could be raised here.

Then it is said that at all events the account should not be taken at 5 per cent. As to those portions of the fund which have yielded 5 per cent. no question can be raised: as to moneys which have been properly invested yielding some other rate, and which can be shewn to have been so invested, only the interest so actually yielded must be brought into account. With regard to such portions of the fund as were improperly invested, which includes the security on the reversionary interest and policy of assurance, the Plaintiff has a right to consider those as not investments which can at all regulate or affect his rights, and to treat the money invested thereon as having been in the hands of the trustees not invested at all. The same observation applies to other moneys which were not invested, but kept in the trustee's hands mixed up with his own moneys, or at all events not separated from them. With regard to the moneys so circumstanced, it appears to me that there has been a breach of trust in not keeping them properly invested and separated, so that they could be distinguished. The money having been subject to trusts for investment in a certain way and accumulation, the question is, what rate of interest ought, under the circumstances, to be charged upon this money in taking the account. I think that there is no absolute rule of law which compels me, under all the circum-

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(1) 3 Jur. (N.S.) 155.

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stances, to charge this trustee with 5 per cent., and I shall charge him with compound interest at 4 per cent. The minutes will provide that interest on the capital moneys is to be carried on after 1849 in the same manner as up to that year. Balances must be taken half-yearly, every sum of interest bearing interest from the date when it was payable.

Solicitors for Plaintiff: *Vallance & Vallance.*

Solicitors for Defendants: *Emmet, Son, & Stubbs,* agents for *Emmet & Walker, Halifax.*

W. W. K.

In re ICKERINGILL'S ESTATE.
HINSLEY *v.* ICKERINGILL.

[1880 I. 771.]

V.-C. H.
1881
March 18, 19.

Bequest of Legacy for Life—Power of Appointment—Residuary Gift—Exercise of Power by Will—Death of Appointee before Appointor—Next of Kin of Appointor entitled.

23 Ch D 219

Testator by his will gave a sum of money to his son *M.* upon trust to invest and to pay the income unto his daughter *A.* for her separate use for life, and after her death upon trust to pay the principal sum and interest unto such persons as *A.* should by deed or will appoint, and in default of appointment upon trust for *M.*'s own benefit. The testator bequeathed to *M.* his residuary estate, and appointed him sole executor. The money was invested by *M.* upon mortgages, and the income paid to *A.* till her death. *A.*, who was not seised or possessed of any other property, by her will gave all her money and securities for money, furniture, and all other her personal estate and effects, and property, and all her real estate, if any, unto her two sisters *H.* and *C.* in proportion, *i.e.*, one-third part of all her real and personal property and effects to *H.*, and two-thirds of all her real and personal property and effects to *C.* absolutely, and she appointed *C.* sole executrix, and charged her property and effects with the payment of her debts and funeral and testamentary expenses. *C.* died in 1868, and *A.* in 1880, and *H.* was appointed administratrix of the will:—

Held, that the two-thirds of the moneys, subject to the payment thereout of a proportion of the debts, and funeral and testamentary expenses, belonged to the next of kin of *A.*, and not to *M.*, the residuary legatee.

MATTHEW ICKERINGILL, who died in July, 1860, by his will made on the 21st day of that month, after devising his real estate to his son *Matthew* (a Defendant) absolutely, gave the sum of £770 unto his said son, his executors, administrators, and assigns, upon trust to invest the same upon the securities therein mentioned, and to pay the income unto and for the sole and separate use of his daughter, *Alice Ickeringill*, during her life, and after her decease, upon trust to pay and apply the principal sum of £770, and the interest thereof, unto and for the use and benefit of such person and persons, and for such intents and purposes, as his said daughter, whether covert or sole, should by deed or will appoint, and in default of any such direction or appointment, upon trust for his son *Matthew*, to retain and apply the said principal and interest for his own use and benefit. The testator bequeathed his residuary personal estate to his son *Matthew*, and appointed him sole executor of his will. The £770 was invested on two mortgages, and the interest was paid to *Alice Ickeringill* until her death, on the 24th of February, 1880.

By her will, made on the 16th of June, 1866, *Alice Ickeringill* said: "I give and bequeath all my money, and securities for money, wearing apparel, furniture, and all other my personal estate and effects, and property whatsoever and wheresoever, and all my real estate, if any, unto my two sisters, *Mary Hinsley* and *Lucy Carlile*, their heirs, executors, administrators, and assigns, according to the nature and tenure of the premises respectively, in the shares and proportions following, that is to say: one equal third part or share of all my said real and personal property and effects unto my said sister *Mary Hinsley*, her heirs, executors, administrators, and assigns, and two equal third parts, or shares, of all my said real and personal property and effects unto my said sister *Lucy Carlile*, her heirs, executors, administrators, and assigns. I appoint my said sister *Lucy Carlile* sole executrix of this my will, and I charge my said property and effects with the payment of my debts, and funeral and testamentary expenses."

Lucy Carlile died on the 16th of October, 1868.

Soon after the death of *Alice Ickeringill*, in February, 1880, letters of administration with her will annexed were granted to *Mary Hinsley*, the Plaintiff, and subsequently thereto the mortgagors paid off the sums invested, and one sum had been paid into Court to the credit of the action, and the other remained in the hands of the Defendant *Matthew Ickeringill*.

Alice Ickeringill at the time of her death was not seised of any real estate, and she was not possessed of any personal estate as distinguished from the legacy of £770, over which she had such power of appointment.

The next of kin of *Alice Ickeringill* were four persons, named, and the Plaintiff, one of them, claimed to have her personal estate administered by the Court, alleging that the effect of her will was to make the two-third parts her personal estate, and that the same was distributable amongst the next of kin.

The Defendant *Matthew* alleged that by reason of the death of *Lucy Carlile* in the lifetime of *Alice Ickeringill,* her will was inoperative as an appointment of the two-thirds of the sum of £770, and that subject to the payment thereout of a due proportion of the debts, funeral and testamentary expenses, of *Alice,* he was entitled thereto under the will of his father.

W. Pearson, Q.C., and *Wiglesworth,* for the Plaintiff:—

Where the appointee, under a power of appointment which has been exercised by a will, dies before the appointor, the donee of the power, the next of kin of the appointor are entitled to the fund, and not those who would be entitled under the original document, as in default of appointment. The executrix of the donee under the power was undoubtedly entitled to say to the executor of the original will, "Pay me the fund." There was here not only the appointment of an executrix, but a charge upon all the property for the payment of debts and expenses, and a direction to pay debts is a complete execution of a power, and indeed the mere appointment of an executor has been held to be so: *Attorney-General* v. *Brackenbury* (1); *Brickenden* v. *Williams* (2); *Wilkinson* v. *Schneider* (3); *Wilday* v. *Barnett* (4); *Laing* v. *Cowan* (5); *Hoskins' Trusts* (6). The testatrix, the donee of the power, by her appointment took the fund out of the original trust, and for all purposes. The facts make that quite clear, as she treated it as her own, calling it her property all through her will. The intention is sufficiently shewn in the appointment. The resulting trust, therefore, is for the benefit of her next of kin. They are entitled as if she had died intestate: *In re Pinède's Settlement* (1); *In re Van Hagan* (2); *In re De Lusi's Trusts* (3).

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(1) 1 H. & C. 782.
(2) Law Rep. 7 Eq. 310.
(3) Ibid. 9 Eq. 423.
(4) Law Rep. 6 Eq. 193.
(5) 24 Beav. 112.
(6) 5 Ch. D. 229; 6 Ch. D. 281.

R. Norton, for a Defendant in the same interest.

Eddis, Q.C., and *Bunting*, for the Defendant *Matthew Ickeringill*:—

In the event which happened of the death of the appointee before the donee of the power, the two-thirds of the fund appointed to her resulted for the benefit of the Defendant *Matthew*, who is entitled as residuary legatee under the original will, as in default of appointment. The questions of the statutory effect of an execution of a general power of appointment, and of the intention as expressed in the will of the appointor to make the fund her own, have been confounded. It is submitted that no such intention is shewn here. In *In re Davies' Trusts* (4) the law on the subject is fully stated, and the decision there is a distinct authority in favour of the claim of the residuary legatee. There is also the case of *Hoare* v. *Osborne* (5), where Vice-Chancellor *Kindersley* decided that the exercise by a married woman of the power given to her did not make the appointed property her absolute estate, but that on the lapse occurring it went as in default of appointment. The case of *Wilday* v. *Barnett* (6) was one under the statute. There was no question of lapse. In every case under the statute the property goes to the executor by virtue of it, and the statute operates as an execution of the power; but the Courts have considered that the intention of the appointor, when making the will, must be looked to. A distinction has been drawn between the cases where the donee of the power appoints in trust for the appointee, and where the appointment is to the appointee direct. In the former case an intention is shewn to take the fund out of the original document—will or settlement—and to put it under a different trust; but in the latter, although by force of the statute the fund becomes assets for the payment of debts, yet it vests in the executor only for that purpose. Such an appointment does not express an intention to bring the case within the authorities which have been referred to. The point for decision now was left untouched in *Wilday* v. *Barnett* (1), and the same may be said of the decision in *Laing* v. *Cowan* (2), that case being similar to this. It is submitted that the mere fact of appointing an executor, and of directing the payment of debts, does not indicate any intention whatever. The other cases referred to are distinguishable from the present.

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(1) 12 Ch. D. 667.
(2) 16 Ch. D. 18.
(3) 3 Ir. Law Rep. 232.
(4) Law Rep. 13 Eq. 163.
(5) 10 Jur. (N.S.) 694; 12 W. R. 661.
(6) Law Rep. 6 Eq. 193.

[They also referred to *Fleming* v. *Buchanan* (3).]

W. Pearson, in reply:—

The decisions shew that it is not necessary that a separate trust should be created in order that the Court may be enabled to say that the donee of the power intended to take the fund out of the original will for all purposes. The case of *In re Davies' Trusts* (4) was before Vice-Chancellor *Wickens*, and was decided by him long before the more modern decisions upon the subject. The Vice-Chancellor said he did not find a sufficient intention expressed to take the fund out of the original settlement for all purposes, but his decision cannot stand with that in the later case of *In re Pinède's Settlement* (5), which it is submitted should now be followed. In *Hoare* v. *Osborne* (6) the appointment was by a married woman, and the decision is not applicable to this case.

HALL, V.C.:—

The question which I have to determine is, I think, having regard to the authorities, one of considerable difficulty. The difficulty arises out of the decisions in *In re Davies' Trusts*, and subsequent cases, in particular of *In re Pinède's Settlement*, before the Master of the Rolls, *In re Van Hagan* (7), before the Court of Appeal, and *In re De Lusi's Trusts* (8), before Vice-Chancellor *Chatterton* in *Ireland*. The question which I have to decide is whether *Alice Ickeringill*, the donee of the power, meant by the exercise of it to take the property dealt with out of the instrument creating the

(1) Law Rep. 6 Eq. 193.
(2) 24 Beav. 112.
(3) 3 D. M. & G. 976.
(4) Law Rep. 13 Eq. 163.
(5) 12 Ch. D. 667.
(6) 10 Jur. (N.S.) 694.
(7) 16 Ch. D. 18.
(8) 3 Ir. Law Rep. 232.

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HINSLEY *v.* ICKERINGILL.

power for all purposes, or only for the limited purpose of giving effect to the particular disposition expressed. The will of *Alice Ickeringill* deals with the property which is disposed of by the gift by her of all her money, and securities, and all other her personal estate, and property, and all her real estate to her two sisters absolutely, according to the nature and tenure of the premises, in the proportions mentioned. The will in the case of *In re Davies' Trusts* (1) contains a gift "of all the rest, residue, and remainder of my moneys in the funds and all moneys due to me on mortgage or otherwise, and all my personal estate wheresoever and whatsoever of which I shall die possessed or have any title to or interest in unto" a sister and two brothers, "to be equally divided between them share and share alike as tenants in common," and one brother was appointed executor of the will.

There is this difference between the two wills. The will in *In re Davies' Trusts* only disposed of personal estate. There was a previous direction to pay debts and certain legacies, and then there was the gift of the personal estate. In the present case the disposition includes the real estate of the testatrix, and whether she was seised of any or not is not material, in my opinion, for the purpose of construing this will, because it would operate upon any real estate of which she might have been seised at the time of her death, and she gave all her property whatsoever and wheresoever, including all her real estate, to her two sisters. It is not disputed that all the property did, as to the part mentioned, pass to one sister, and that the other part would have passed to the other sister if she had survived the testatrix. The testatrix, in making the gift of the proportions, speaks of all her real and personal property and effects, and she, after appointing one sister sole executrix, charged her said property and effects with the payment of her debts and funeral and testamentary expenses. The appointees—whether as devisees or legatees—were to take the property subject to that charge. Therefore, as regards the real estate, they would take it with the other property charged with the payment of debts and expenses, and they would, as I consider, have to pay and satisfy them—they in effect and substance took the property subject to a trust to do that. There is, at all events as regards real estate, a disposition of it to them clothed with a duty cast upon them to pay the debts and expenses out of it, if necessary. It seems to me that, looking at the whole of the will, although the difference between it and the will in *In re Davies' Trusts* (1) may be considered not very prominent, the testatrix has treated all the property which she had power to appoint, and which was held by a trustee subject to her appointment, as being her own property, and so treating it, it must be considered and held that she dealt with it for all purposes of ownership, beneficial and otherwise, as taken out of the original disposition of her father—the donor of the power. In my opinion, by her will the testatrix in substance said: "I am making my will. I am disposing of all the property which I can dispose of, and am dealing with it as being my own." Therefore, so making her will, and so disposing of and treating the property, the result is that that part which by reason of the death of one sister lapsed, must go in the same way as the testatrix's own property would go, to those claiming under her, and not to those claiming under the will of the donor of the power. There will be a declaration accordingly as to the two-thirds of the property.

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(1) Law Rep. 13 Eq. 163.

Solicitors: *Ridsdale, Craddock, & Ridsdale*, agents for *Weddall & Parker, Selby, Yorkshire; Learoyd & Co.*

(1) Law Rep. 13 Eq. 163.

T. F. M.

FRY, J.
1881
March 19.

In re SILKSTONE AND DODWORTH COAL AND IRON COMPANY.

Winding-up—Lease of Mine—Power to distrain and stop working—Payment of full Rent.

Pol 162 – 6
21 Ch D. 327

The owner of a coal-mine leased to a company, having power to distrain for rent in arrear and to stop the working of the mine, gave notice to the liquidator requiring payment of a half-year's rent which became due after the winding-up of the company, or that the working should be stopped. The liquidator neither paid the rent nor stopped the working:—

Held, upon summons by the lessor for leave to distrain, that the liquidator having elected to continue the working for the advantage of the company, must pay the full rent out of the first assets.

THIS was an adjourned summons in the winding-up of the *Silkstone and Dodworth Coal and Iron Company* by *R. Perkins* and another, as landlords of one of the coal-mines which had been worked by the company, for leave to distrain for rent. The lease of the coal-mine, which was for twenty-one years, was dated the 1st of January, 1880, and the rent was made payable half-yearly on the 3rd of May and the 3rd of November. The lease contained a proviso that whenever any rent should be in arrear for thirty days it should be lawful for the lessors to stop the working of the mine, and to enter and distrain for the rent; and if no sufficient distress could be found, or if there should be a breach of any of the lessee's covenants for which a money payment would not be an adequate compensation, then the lessors were to have power to re-enter, and the term was to cease.

The petition for winding up was presented on the 7th of October, 1880, and a provisional liquidator was then appointed. The order for winding up was made on the 5th of November, and an official liquidator was afterwards appointed. The rent due under the above lease was paid up to the 3rd of May preceding the winding-up, consequently the next half-year's rent became due on the 3rd of November. On the 6th of December the landlords gave notice to the liquidator requiring payment of the full rent due up to the 3rd of November, or in default of payment that he should stop the working of the mine. The rent was not

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paid, but the working of the coal was continued, and it was alleged that large quantities of coal had been worked.

This summons was taken out on the 13th of December for leave to distrain for the whole of the rent which became due on the 3rd of November.

Popham, in support of the summons:—

It is submitted that the entire rent which became due after the winding-up ought to be paid by the liquidator, for this reason, that notice was given to him on the 6th of December that either the rent must be paid or the works stopped, but the liquidator, for the advantage of the company, continued to work the mine and paid no rent. We had power to distrain upon non-payment of the rent for thirty days, and the liquidator, by continuing the workings, has purchased the right at the expense of paying the rent. He has elected to fulfil the terms of the lease, one of which is payment of rent. This is the same as the case of *In re North Yorkshire Iron Company* (1), where a company in course of liquidation retained for the convenience of the winding-up the possession of certain leasehold premises, the lease of which contained the usual proviso for re-entry by the lessor, and leave was given to the lessor to distrain for rent accrued due after the commencement of the winding-up, but not for rent due before that time, as to which he was to prove as a creditor in the winding-up. We therefore contend that we should be allowed to distrain for the whole rent which accrued due after the winding-up.

Higgins, Q.C., and *Cozens-Hardy*, for the liquidator:—

We say that for rent due before the winding-up the lessor can only prove against the assets, *pari passu* with the other creditors, and that under the *Apportionment Act*, 1870 (33 & 34 Vict. c. 35), s. 2, the rent must be apportioned up to that time. The lessor cannot have payment of the full rent which became due after the winding-up; this point was decided in *Swansea Bank* v. *Thomas* (2).

The lessor, therefore, can only distrain for the proportion of the rent which became due after the presentation of the petition for winding up.

(1) 7 Ch. D. 661.

(2) 4 Ex. D. 94.

FRY, J.:—

In my judgment the landlords are entitled to the full amount. It appears that the rent which is now in question accrued on the 3rd of November, and that on the 5th of November an order was made for winding up this company, which related back to the 7th of October, when the petition was presented. It is argued that the rent due on the 3rd of November ought to be apportioned between that period and the 7th of October, 1880. That question I do not intend to determine at all, because in the present case the lessors had this power: If rent remained unpaid for thirty days after the usual day of payment, they had a right to enter and to stop the working as well as to distrain; and accordingly on the 6th of December, they gave notice to the liquidator demanding either payment of the arrears of rent or the stoppage of the works, when the liquidator, considering it desirable to carry on the enterprise, of which this colliery forms a part, neither stopped nor paid the rent, but continued working. That is, in my view, an election by the liquidator to continue in possession of the property, and if he continued in the possession of the property he could only do so upon the terms of the lease, and it is only equitable, if he keeps the lease as an asset of the company and for the purposes of the liquidation, that he should satisfy those conditions upon which the asset remains his; in other words, he should pay the rent in full.

I find that in *In re Lundy Granite Company* (1), Lord Justice *James* expresses himself in these terms: "In some cases between the landlord and the company, if the company, for its own purposes and with a view to the realization of the property to better advantage, remains in possession of the estate, which the lessor is therefore not able to obtain possession of, common sense and ordinary justice require the Court to see that the landlord receives the full value of the property; he must have the same rights as any other creditor, and if the company choose to keep the estates for their own purposes they ought to pay the full value to the landlord, as they ought to pay any other person for anything else, and the Court ought to take care that he receives it." The principle enunciated in that paragraph appears to me to

(1) Law Rep. 6 Ch. 462.

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entirely apply, because, but for the liquidator electing not to stop, and to put an end to the working, the asset might have been lost.

The landlords were not in the position merely of persons who had a money demand against the company. They were on the expiration of the thirty days from the 3rd of November in the position of persons who had a money demand against the company, and a power to render less valuable an asset of the company. It was because they were armed with that power, and because the liquidator chose to act in a manner inconsistent with it, that I think the landlords are entitled to the full satisfaction of the terms upon which the asset had been granted to the company—in other words, that the amount should be paid in full out of the assets of the company, and that precedence should be given to the payment of that amount.

Solicitors: *Wilkinson & Son; Pritchard, Englefield, & Co.*

T. W. G.

In re SOUTH KENSINGTON CO-OPERATIVE STORES.

FRY, J.
1881
April 1, 2.

Winding-up—Landlord's Power to distrain—Rent apportionable—Apportionment Act, 1870 (33 & 34 *Vict.* c. 35).

Where a company in liquidation continued in the possession of leasehold premises for the purpose of carrying on their business:—

Held, that the rent of the premises must be apportioned under the Act 33 & 34 Vict. c. 35, the landlord of the premises being entitled to prove jointly with the other creditors for so much rent as became due up to the date of the presentation of the petition for winding up, when a provisional liquidator was appointed, and being entitled to distrain for the full rent due after that day.

Query, whether there would be any such apportionment in a case where the landlord sought to proceed by re-entry instead of by distress.

18 Ch D 6
19 Ch D 42
— 642
21 Ch D 3
330

THIS was a summons in the winding-up of the *South Kensington Co-operative Stores*, on the part of *Alfred Seymour*, the landlord of the premises occupied by the company at 19 and 20, *Cromwell Place*, for leave to enter and distrain upon the premises, under a power in the lease granted to the company by *Alfred Seymour*, for the sum of £225, being one quarter's rent due under the lease on

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the 25th of December, 1880. The lease was granted on the 12th of November, 1879, to the company for twenty-one years, at a rent of £900. The rent was paid up to the 24th of June, 1880, but since that date no rent had been paid.

A petition was presented to this Court on the 27th of November, 1880, for the winding-up of the company, and *Henry Leslie* was then appointed provisional liquidator.

On the 10th of December the order to wind up was made, and *Henry Leslie* was continued as the official liquidator, and since that date he had occupied the premises for the convenience of winding up, and for the benefit of the shareholders, with a view to disposing of the business of the company. The business was still being carried on upon the premises by the said *Henry Leslie*, who alleged that he was only liable for payment of rent from the date of his appointment as official liquidator, namely, the 10th of December, and he refused to pay any rent in respect of the quarter terminating on the 25th of December, beyond an apportional part thereof from the 10th to the 25th of December, and he alleged that the landlord was only entitled to prove in the winding-up for the rent due on the 29th of September, and for an apportional part from that day to the 10th of December. The said *A. Seymour* was willing to prove for the rent due on the 29th of September, but claimed to be entitled to distrain for the whole quarter due on the 25th of December.

North, Q.C., and *Yate Lee*, for the landlord:—

We contend that the rent ought to be paid in full up to the 25th of December, 1880, the quarter day after the winding-up. The landlord's hands were tied until that day, and he had no power to distrain till the end of the quarter. His right is not taken away by the winding-up, and he ought not to be brought down to a level with the other creditors. In *In re Lundy Granite Company* (1) the landlord was allowed to distrain for rent which accrued after the winding-up; and in the case of *In re Silkstone and Dodworth Coal and Iron Company* (2), your Lordship held that the lessor of a mine was entitled to distrain for the full rent which became due after the winding-up, on the ground that the

(1) Law Rep. 6 Ch. ~~462~~.

(2) *Ante*, p. 158.

liquidator had continued the working of the mine for the benefit of the company. In this case the company have continued in the occupation of the premises in order to carry on the business. This is not a case coming under the *Apportionment Act*, but if it were, then the full rent would be payable from the date of the presentation of the petition for winding up, when a provisional liquidator was appointed with full power to carry on the business, and he elected to hold the premises and continue the business for the benefit of the company.

Higgins, Q.C., and *H. B. Buckley*, for the liquidator:—

We say that the rent ought to be apportioned under the Act 33 & 34 Vict. c. 35. The 2nd section provides that all rents and other periodical payments shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly. There is nothing to take this case out of that provision. It was decided in *In re Coal Consumers Association* (1), that the rules in the winding-up of companies were not so far assimilated to the Rules in Bankruptcy as to give the landlord of property of which a company in liquidation are tenants, a right to distrain for rent due before the winding-up. A proportionate part of the rent was provable on the day of the winding-up, though not payable till the expiration of the quarter. The landlord can only prove in the winding-up jointly with the other creditors for rent due before the winding-up, and he can only distrain for rent subsequently due: *Traders North Staffordshire Carrying Company* (2); *In re Bridgewater Engineering Company* (3); *In re North Yorkshire Iron Company* (4).

Then we say that the day on which the apportionment should be made is when the winding-up order was made, because it was not till then that an official liquidator was appointed who had power to act on behalf of the company. Everything done before that day was provisional.

FRY, J.:—

In this case it appears that the lease was granted on the 12th

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(1) 4 Ch. D. 625.
(2) Law Rep. 19 Eq. 60.
(3) 12 Ch. D. 181.
(4) 7 Ch. D. 661.

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of November, 1879, to the company, and that the rent was paid down to the 24th of June, 1880. The rent was payable quarterly, and the quarter's rent for the 29th of September, 1880, was never paid. On the 27th of November, 1880, a petition was presented for the winding-up of this company, and on the same day a provisional liquidator was appointed, with power to carry on the business of the company, which power the provisional liquidator exercised by carrying the business on.

On the 10th of December the winding-up order was made, and the person who had previously acted as provisional liquidator was appointed official liquidator, and he continued to carry on the business of the company, and for that purpose occupied the leasehold property which had been demised to the company.

The landlord now comes and asks me to allow distress to be levied on the goods of the company. That is an application to the judicial discretion of the Court. It is hardly in controversy between the parties that, roughly speaking, the rent which accrued before the liquidation should be a matter of proof, and the subsequent rent a matter of full payment; but two questions have been discussed between them which are necessary to be determined in order that I may exactly state the rule on which I proceed. I will say at once I intend to proceed substantially on the same rule as that followed by Vice-Chancellor *Hall* in the case of *In re North Yorkshire Iron Company* (1), because it appears to me that the rule there adopted is a reasonable and sound one.

The first question is this, is the calculation of rent to be made from the 27th of November, the date of the presentation of the petition, and, consequently, the commencement of the liquidation, or from the 10th of December, the day when the winding-up order was made? In my judgment it ought to be computed from the 27th of November, and for this simple reason, that that is the date which fixes the liabilities and claims against the company which are provable in the course of the winding-up. No doubt a General Order has directed that those liabilities and claims shall be valued as from the date of the order for winding-up, but that does not interfere with the fact that the claims and liabilities are those which existed at the commencement of the winding-up.

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(1) 7 Ch. D. 661.

Therefore, drawing the line, as I think I ought, between the debts which are provable under the winding-up and those which are not, it appears to me the commencement of the winding-up is the period at which I ought to draw that line.

The next inquiry is this, whether the rent which I ought to allow to be proved for, and the rent which I ought to allow to be paid in full or distrained for, are to be divided by the quarter days when the rent became due or by a reference to the commencement of the winding-up. The order of the Vice-Chancellor *Hall*, which I have already referred to, directed the inquiry what rent was due at the commencement of the winding-up. Now, if that be the true inquiry, it appears to me plain that I must, to use the common expression, apportion the rent between the periods before and after the 27th of November, 1880, and, in my judgment, I ought so to do, because the *Apportionment Act* of 1870 has declared that all rent shall be considered as accruing from day to day, and shall be apportionable in respect of time accordingly. It declared that rents should be apportionable like interest on money lent. Now, how did the law stand before this Act was passed? Plainly in this way, that rent neither accrued due, nor was payable except on the day on which it was reserved; whereas interest or money lent accrued due *de die in diem*, although it might be payable at certain specified days. The effect of the section is to declare that rent, like interest, accrues due from day to day, and that the payments of rent, like the payments of interest, when they are periodical, shall be apportioned in respect of the time at which the rent, like the interest, accrued due.

Now, if that is the true construction of the Act, it follows that the rent which had accrued due up to the 27th of November, 1880, was a debt provable against the company under the liquidation, and that the rent which accrued after was not so.

In my judgment the rent which accrued due is that which ought to be proved for. The rent which cannot be proved for is that which ought to be paid in full. I shall therefore direct that the applicants be at liberty to distrain.

Higgins, Q.C.:—If your Lordship pleases. We will undertake to pay. It is a mere question of law.

FRY, J.:—Very well. Then I will direct that the official liquidator pay the rent as from the 27th of November, 1880, apportioning the same accordingly.

There is one other observation I desire to make. This is not a case in which the landlord has endeavoured to enforce his right of re-entry. If he had done so, and had come on that ground, it does not follow that my decision would have been the same as now, and for this reason, that in that case he would be seeking to exercise a legal right to determine the term, and if the company desire to hold an estate subject to a legal right it may well be that I should have decided as I did recently in *In re Silkstone and Dodworth Coal and Iron Company* (1), that the company must satisfy the legal condition which precluded the legal rights from being exercised. I make that observation in order that it may not be supposed that I consider this case the same as that I decided the other day.

Higgins, Q.C., asked for the costs.

FRY, J.:—I shall give the landlord his costs, but I shall direct your costs to be costs in the liquidation. The rent will be payable in full as from the 27th of November.

Solicitors: *Still & Son; Bridges, Sawtell, & Co.*

T. W. G.

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(1) *Ante*, p. 158.

WORMALD *v.* MUZEEN.

[1874 W. 116.]

FRY, J.
1881
March 31.

Annuity—Charge on Income or Corpus—Continuing Charge.

A testator directed his trustees to pay an annuity out of the rents and profits of a trust estate by half-yearly payments, and he bequeathed the remainder of such rents and income in trust for his sister for life, with remainder to her children:—

Held, that the annuity was a continuing charge on the rents and profits. *Stelfox* v. *Sugden* (1) considered.

[illegible]

GEORGE WORMALD, by his will, dated in 1874, gave his household effects to his wife, and, after bequeathing two annuities, he gave, in the event of there being no children (which event happened), the residue of his real and personal estate upon trust "out of the rents, profits, and income, to pay to his wife the clear annual sum of £300, during her natural life, by half-yearly payments," and upon trust "to pay the remainder of such rents and income" to Mrs. *Muzeen* for her separate use for her natural life, and after her death "upon trust as to the said trust estates" for her children equally.

The rents became insufficient to pay the full annuity of £300 to Mrs. *Wormald*, and the question arose whether she was entitled to the £300 as a charge on the *corpus*, or whether she could resort to the income of subsequent years to make up the deficiency of former years.

J. Pearson, Q.C., and *Bardswell*, for the Plaintiff.

Nalder, for the trustees of the will.

Dunning, for the other Defendants:—

This annuity is not a charge upon the *corpus*, nor a continuing charge upon the rents: *Booth* v. *Coulton* (2); *Taylor* v. *Taylor* (3). The testator clearly supposed that the rents would be sufficient to pay the annuity, and has made no provision for the event which has happened: *Stelfox* v. *Sugden* (1).

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(1) Joh. 234.

(2) Law Rep. 5 Ch. 684.

(3) Law Rep. 17 Eq. 324.

Pearson, in reply:—

In *Stelfox* v. *Sugden* (1) there was a direction that there should be an annual division, and the case was decided on that ground.

FRY, J.:—

In my opinion the annuitant is entitled to receive her annuity out of the rents and profits accruing not merely during her life but afterwards. There is no limitation of time expressed for the application of the rents and income for the benefit of the testator's wife, and the will contains no direction that any residue of the rents and income shall, during the life of the testator's widow, be paid to any one else, though it provides generally that any residue shall be paid to the testator's sister with remainder to her children.

The only difficulty which I feel in coming to this decision arises from the case of *Stelfox* v. *Sugden*, which was very properly pressed upon me by Mr. *Dunning;* but I do not think it is conclusive in his favour, otherwise I should follow it.

In that case there was a bequest of an annuity out of rents and income as in this case, but the will provided for the destination of the surplus during the life of the annuitant, which was the ground on which the annuity was decided to be a charge on the income only.

Vice-Chancellor *Wood* said (2): "It was argued on behalf of the widow that there is in the will an unlimited dedication of the income for the purpose of satisfying the annuity bequeathed to her during her life. The direction is 'out of the interest and annual proceeds of the trust moneys to pay to the widow the clear annual sum of £100 without any deduction.' That direction it was said contains no limitation with regard to the period during which such interest is to be received. It is followed in the gift over after the decease of the wife by a declaration that the trustees shall stand possessed of the residue of the trust moneys and divide them among the parties therein named. Now, if the will contained those directions alone, and omitted the intervening direction with reference to the residue of the interest and proceeds during the life of the testator's wife (which seems to me to be alone conclusive of the question before me)—if it were the simple

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(1) Joh. 234.

(2) Joh. 240.

FRY, J.
1881
WORMALD
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MUZEEN.

case of a gift of all dividends and income without limit as to time for the purpose of meeting an annuity after the death of the annuitant, a bequest of the residue of the principal sum to other parties, the authorities cited would be strongly in favour of the contention that the annuity is a charge on the *corpus* and not merely on the income, and that the trustees are bound to go on applying the income in payment of the annuity until that annuity shall be entirely satisfied."

The case which Vice-Chancellor *Wood* there put by way of hypothesis seems to be the very case which has happened here, and the result is that I declare the Plaintiff's annuity of £300 to be a continuing charge on the rents and profits of the estate.

Solicitors: *Burton, Yeates, & Hart; Emmet, Son, & Stubbs; Collyer-Bristow & Co.*

C. W. C.

EMDEN *v.* CARTE.

[1880 E. 0271.]

FRY, J.
1881
April 11.

Bankruptcy—Architect—Undischarged Bankrupt—Right of Action—Personal Labour—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 17—*Practice—Rules of Court,* 1875, *Order* XVI., *r.* 13—*Adding Plaintiff.*

19 Ch.D. 312.

The Plaintiff, who was an architect, sued for remuneration in respect of employment under a contract made in 1877, and for damages for an alleged wrongful dismissal from such employment in 1880. The Plaintiff was adjudicated bankrupt in 1878:—

Held, that the cause of action for remuneration and damages, passed to the trustee in bankruptcy.

The Court cannot substitute one plaintiff for another under Rules of Court, 1875, Order XVI., r. 13, except by the first plaintiff's consent, and where he admits that he has commenced his action improperly: but in a proper case the Court will add a plaintiff and give him the conduct of the action.

Affd by Ct of Appl post 768. C.A.

THIS was a summons by the trustee in bankruptcy of the Plaintiff to have himself substituted as Plaintiff, on the ground that the Plaintiff had no interest in the subject-matter of the action.

The Plaintiff was an architect and surveyor who had become bankrupt in 1878, and subsequently, without the consent of his

Charge order for plts costs refused by Fry J. but
granted by Ct of Appeal limited however to the
costs up to the determination of the trustee of

trustee, acted as architect for the Defendant under a prior agreement of April, 1877. He instituted his action in June, 1880, against the Defendant, stating that the Defendant had in or about April, 1877, agreed to employ him as architect in certain works; that in the year 1879 the Plaintiff prepared specifications and drawings and incurred expense as the Defendant's agent and architect; and that on the 9th of June, 1880, the Defendant had dismissed him from being his architect, at the same time making against him an unfounded charge of dishonesty; and the Plaintiff claimed, 1. An injunction to restrain the Defendant from employing any other person as architect; 2. Specific performance of the agreement of 1877; 3. The remuneration due to him for his services; 4. Damages for wrongful dismissal and breach of contract.

The Defendant denied that the services had been performed by the Plaintiff as alleged by him, but stated his willingness to pay some remuneration in respect of his services, although his plans and specifications were not useful and could not be used by him, and paid £360 into Court as being the utmost sum due to him.

The Plaintiff's adjudication in bankruptcy was dated the 30th of April, 1878, and he was undischarged, and the trustee in bankruptcy took out this summons, dated the 26th of November, 1880, to be substituted as Plaintiff.

Francis Turner, for the summons:—

The trustee in bankruptcy is entitled to all that the Plaintiff seeks to recover in this action, and ought to be substituted for him as Plaintiff: *Bankruptcy Act*, 1869, s. 15, sub-s. 3; *Clowes* v. *Hilliard* (1); *Brice* v. *Bannister* (2); *Wadling* v. *Oliphant* (3); *Elliot* v. *Clayton* (4); *In re Dowling* (5); *Seear* v. *Lawson* (6). The Court has power to strike out a party improperly made plaintiff, and to substitute another: *Tildesley* v. *Harper* (7); *Judicature Act*, 1873, s. 24; Rules of Court, 1875, Order XVI., rr. 2, 13, 14; *Brice* v. *Bannister*.

(1) 4 Ch. D. 413.
(2) 3 Q. B. D. 569.
(3) 1 Q. B. D. 145.
(4) 20 L. J. (Q.B.) 217.
(5) 4 Ch. D. 689.
(6) 15 Ch. D. 426.
(7) 3 Ch. D. 277.

Beddall, for the Plaintiff:—

The cause of action in this case does not pass to the trustee in bankruptcy: *Coles* v. *Barrow* (1); *Beckham* v. *Drake* (2); *Kitson* v. *Hardwick* (3); *Ex parte Vine* (4). The Court has no jurisdiction to substitute one plaintiff for another against the will of the first plaintiff. Whether right or wrong in his action, he may carry it on as he pleases. In *Tildesley* v. *Harper* (5) the plaintiff consented to the application.

F. Turner, in reply, cited *Jameson* v. *Brick and Stone Company* (6).

Higgins, Q.C., and *Everitt*, for the Defendant.

FRY, J.:—

In this case the Plaintiff became bankrupt before his employment began, and his trustee in bankruptcy asks to be substituted as plaintiff in the action, on the ground that the profits, if any, made by him as an undischarged bankrupt, belong, not to him personally, but to the estate. The first question, therefore, to be decided is whether the right of action in respect of the sums sought to be recovered for remuneration and damages belongs to the bankrupt, who has not obtained his discharge, or passes to his trustee in bankruptcy. In my opinion the answer is that the right passes to the trustee.

The principle is clearly laid down in *Elliot* v. *Clayton* (7), where the action was by a surgeon and apothecary for goods sold and delivered, and the plaintiff was an uncertificated bankrupt when the cause of action accrued, and the Court held that the plaintiff was not entitled to recover the value of his services, as being a mere demand for personal labour, but that he was in substance carrying on his business, and that the proceeds passed to his assignees. The case of an architect who uses and supplies plans and papers must be decided on the same principle as that of the apothecary who uses drugs which are increased in value by his personal labour. I adopt the citation from *Smith's* Mercantile Law, made by Mr. Justice *Willes* in *Kitson* v. *Hardwick* (1), where it is said that the trustee takes not merely the bankrupt's personal property, but also all such as may be acquired by or devolve on him during the continuance of the bankruptcy. He has, however, an interest in it subject to this right, and is entitled to recover it from strangers if the trustee do not interfere, which he may do even after the bankrupt has commenced an action for the property. The trustee, indeed, has no right to seize the profits of his personal and daily labour, for that would be to deprive him of the means of existence . . . but a bankrupt who acts as a furniture broker and employs men and vans, or who attends as an apothecary and furnishes medicine, cannot be considered as merely using his personal labour in this sense." The view I take is confirmed by the decision of the House of Lords in *Beckham* v. *Drake* (2). I find Lord Chief Justice *Wilde* giving his opinion in that case, among the other Judges, in the following terms (3): "If salary or wages or commission under a contract of service are due at the time of the bankruptcy, the right to recover such wages, salary, or commission would pass to the assignees as part of the personal estate, without regard to the consideration of whether the contract or services had had relation to the personal skill or labour of the bankrupt. This is an action personal to the bankrupt in this sense, that it arose out of a contract founded on the personal confidence in the bankrupt, and which could only be performed by his personal labour and skill; and in the same sense, contracts are personal made with factors, salesmen, agents of various kinds, masters of ships, bankers, attorneys, architects, engineers, and various other persons whose personal skill, knowledge, and integrity, are the inducements to the contracts: but surely it cannot be contended that the right of action for breaches of contract in relation to such employments accruing before the bankruptcy would not pass to the assignees." In that case the breach was before the bankruptcy, which was not the case here; but it is observable that the Judge held that an architect stands upon the same footing as other professional men who do not give merely their personal services. *Jameson* v. *Brick and Stone Company* (1) only decides that an undischarged bankrupt may maintain such an action as this if the trustee does not interfere. Therefore I hold that the fruits of the contract, whatever they may be, pass to the trustee; and *Wadling* v. *Oliphant* (2) is an authority that damages for an improper dismissal would pass to the trustee.

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(1) 4 Taunt. 754.
(2) 2 H. L. C. 579, 615.
(3) Law Rep. 7 C. P. 473.
(4) 8 Ch. D. 364.
(5) 3 Ch. D. 277.
(6) 4 Q. B. D. 208.
(7) 20 L. J. (Q.B.) 217.

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(1) Law Rep. 7 C. P. 473, 479.

(2) 2 H. L. C. 579.

(3) 2 H. L. C. 633.

The next question I have to consider is in what manner may the trustee intervene. I have some difficulty about substituting the trustee for the bankrupt, because, as I read the Orders under the *Judicature Act*, they do not allow such substitution except when the action has been commenced under a *bonâ fide* mistake on the part of the plaintiff. Here the Plaintiff does not admit any mistake, but insists on his rights. I am of opinion, however, that I may add the trustee as plaintiff under Order XVI., rule 13, and I think the most proper and convenient course is to add his name as plaintiff and to give him the conduct of the action, especially as the Plaintiff has asked for relief (such as an injunction) which he does not seem entitled to, while the damages and remuneration to which he may be entitled pass, in my opinion, to the trustee. As, therefore, the trustee has the substantial right of action, I hold that it is just and fit to make the order I have stated.

7 P.D. 33.
—163

Solicitor for Plaintiff: *F. C. Tudor.*
Solicitor for Trustee in Bankruptcy: *J. J. Winser.*
Solicitors for Defendant: *Beyfus & Beyfus.*

C. W. C.

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(1) 4 Q. B. D. 208.

(2) ~~Law Rep~~. 1 Q. B. 145, 152. D/

FRY, J.
1881
Feb. 24, 25, 26;
March 8.

BEDDALL *v.* MAITLAND.

[1879 B. 661.]

Practice—Counter-claim—Extent of Relief—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-s.* 3—*Rules of Court*, 1875, *Order* XIX., *r.* 3; *Order* XX., *r.* 1—*Forcible Entry on Land—Damages—Independent Wrong—Injury to Furniture*—5 *Rich.* 2, *stat.* 1, *c.* 8.

18 ChD 202
8 QBD 429, 430,
21 ChD 160
-176
-803-4
22 ChD 31,
11 QBD 465
469, 472
u84/18

Relief can be given on a counter-claim in respect of a cause of action accrued to the Defendant subsequently to the issue of the writ in the original action.

Original Hartlepool Collieries Company v. *Gibb* (1) not followed.

Semble, that a counter-claim is an independent action, and not part of the original action, though for convenience the two are tried together.

Vavasseur v. *Krupp* (2) questioned.

Damages cannot be recovered against the rightful owner for a forcible entry on land, for the statute 5 Rich. 2, stat. 1, c. 8, only makes a forcible entry an indictable offence, and does not create any civil remedy for it. But for any independent wrong (such as an assault or an injury to furniture) committed in the course of the forcible entry, damages can be recovered, even by a person whose possession was wrongful, for the statute makes a possession obtained by force unlawful, even when it is so obtained by the rightful owner.

Newton v. *Harland* (3), *Pollen* v. *Brewer* (4), and *Lows* v. *Telford* (5) considered.

ON the 1st of January, 1877, an agreement was entered into between the Plaintiff *Charles Beddall*, and the Defendant, *W. L. Maitland*, which contained the following provisions:—

"1. The said *Charles Beddall* having arranged to purchase the existing lease of certain land and premises at *Merton*, *Surrey*, and also an extended lease of the same for a further term of twelve years, and also to purchase certain glass-houses, stock, and other effects belonging to Mr. *W. P. V. Wallis*, at *Southsea*, and to have the same removed to and refixed on the land at *Merton*, and also to find such further moneys as may be necessary for working the aforesaid land and premises for market-garden purposes, has agreed with the said *W. L. Maitland* for his services in connection with the carrying on and working of such business on the following terms and conditions, but it is distinctly understood that the said *W. L. Maitland* is not a partner, and nothing in this agreement is to be construed as constituting a partnership, or to entitle the said *W. L. Maitland* to any share of the glass-houses, land, stock, fixtures, and all other effects of every kind and description now fixed and placed, or to be hereafter fixed and placed, on such land and premises situate at *Merton*.

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(1) 5 Ch. D. 713.
(2) 15 Ch. D. 474.
(3) 1 Scott, N. R. 474.
(4) 7 C. B. (N.S.) 371.
(5) 1 App. Cas. 414.

6 [illegible] 509

"(2.) The existing lease of the aforesaid land and premises at *Merton*, and also the extended lease, to be transferred and made to *Charles Beddall*.

"(3.) All moneys received from the aforesaid land and premises at *Merton* to be paid to *Charles Beddall*, or to such person or account as he may appoint.

"(4.) In consideration of the said *W. L. Maitland* devoting the whole of his time to the aforesaid business, he is to receive for such services 50 per cent. of the net profits after providing for a sinking fund of 20 per cent. At the end of or other sooner determination of this agreement the said sinking fund shall be equally divided between the said *Charles Beddall* and *W. L. Maitland*.

"(5.) The said *Charles Beddall* to have the entire control of the business and expenditure, and no contract shall be entered into without his consent, and any such books and accounts as the said *Charles Beddall* may think necessary shall be kept in such manner and by such person or persons as he may direct.

"(6.) The extended lease to contain a clause giving the said *Charles Beddall* the right to purchase the freehold of the said land and premises at *Merton* within the term of ten years from the present date.

"(7.) In case of breach of any of the above conditions by the said *W. L. Maitland* his employment is to cease, and he is to have nothing further to do with such business.

"(8.) The net profits to be ascertained, after deducting all working expenses, interest on capital (which is agreed shall be £75 per year), and 5 per cent. to the said *Charles Beddall* on the gross returns, and the rent of the said land and premises at *Merton*.

"(9.) The arrangement provided for by clause 4 of this agreement shall be for the period of twenty-one years, subject nevertheless to clause 7, and to the strict compliance of the said *W. L. Maitland* with all the clauses and conditions of this agreement."

The proposed business was afterwards carried on under this agreement, the Defendant acting as the manager. The nursery was called the *Merton Abbey Nursery*. The Defendant was allowed to reside with his wife and family in a house upon the premises. On the 8th of November, 1879, *Beddall* assigned his interest in the property and business to *H. N. Poulton*, and the Defendant continued to act as manager on the terms of the agreement, and also continued to reside in the house as before. On the 9th of December, 1879, *Beddall* and *Poulton* commenced this action against *Maitland*. By their statement of claim, delivered on the 7th of January, 1880, they alleged that the Defendant had not satisfactorily discharged his duties as manager, and that loss had been sustained every year in the carrying on of the business. They alleged also that after the assignment of the 8th of November, 1879, notice was given to the Defendant to determine his employment as manager of the undertaking, and to give up possession of the dwelling-house which he had been allowed to occupy, but that he refused to give up possession, and alleged that he was a partner in the undertaking, The Plaintiffs stated also that *Poulton* had been compelled to eject the Defendant from the dwelling-house.

The Plaintiffs claimed a declaration that they were entitled to the undertaking called the *Merton Abbey Nursery;* an injunction to restrain the Defendant from holding himself out as a partner or joint proprietor with the Plaintiffs, or either of them, in the undertaking, and from selling or offering for sale any portion of the plant, stock-in-trade, or effects thereof, and from pledging the credit of the Plaintiffs, or either of them, or of the undertaking, and from entering into any contracts in the name or on account of the undertaking, and from receiving any moneys due to or in respect of the undertaking, and from intermeddling or interfering with the Plaintiffs in any manner in the undertaking; that if necessary a receiver of the undertaking might be appointed; and other consequential relief.

The Defendant on the 23rd of March, 1880, delivered a statement of defence and counter-claim. He to a great extent denied the Plaintiffs' case, though he admitted the agreement as above stated. In his counter-claim he alleged that *Poulton*, aided and abetted therein by *Beddall*, on the 5th of January, 1880, unlawfully and by force broke into and ejected the Defendant from the house occupied by him and violently put him and his family out of the house, and also violently and recklessly threw thereout and unlawfully took possession of and damaged his goods and effects, and by such unlawful acts greatly injured the Defendant and caused him damage to the amount of £1000. And the Defendant claimed damages for alleged breaches of contract by the Plaintiffs respectively, and also in respect of the injuries alleged to have been committed by them respectively.

By the evidence at the trial it appeared that on the 5th of January, 1880, a Mr. *Robertson*, who was a clerk to the Plaintiffs' solicitors, by the instructions of *Poulton* went, accompanied by several men, to the nursery to demand from the Defendant immediate possession. According to *Robertson's* evidence, he was admitted without any resistance at the front door of the house, and told the Defendant what he had come for. They had some conversation together, and they then went out of the house together to look at the stock in the nursery. While they were outside, the Defendant suddenly ran back into the house and locked the door, and refused to allow *Robertson* to re-enter. *Robertson*, then, with the assistance of the men he had brought with him, forcibly broke open the back door of the house. The Defendant offered no further resistance, and then *Robertson* and his men turned the Defendant and his family out, and put his furniture out of the house.

According to the Defendant's evidence, *Robertson* obtained possession in the first instance by force.

Cookson, Q.C., and *E. S. Ford*, for the Plaintiffs:—

The Defendant cannot, on his counter-claim, claim damages in respect of a cause of action which arose after the issue of the writ in the original action: *Original Hartlepool Collieries Company* v. *Gibb* (1). The alleged wrongful eviction of the Defendant took place some time after the issue of the writ.

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(1) 5 Ch. D. 713.

Beaumont, for the Defendant:—

Your Lordship in *Fritz* v. *Hobson* (1) disregarded the decision in *Original Hartlepool Collieries Company* v. *Gibb* (2).

[FRY, J.:—I did not disregard it. *Fritz* v. *Hobson* came within Lord *Cairns*' Act, and I held that, as under that Act damages could be given in substitution for the injunction, they could be given down to the same date to which an injunction could have been given. In the present case the Defendant's whole cause of action arose after the issue of the writ. It is not merely a question to what extent the assessment of damages should be carried in respect of a wrong begun before and continued after the issue of the writ.]

In *Original Hartlepool Collieries Company* v. *Gibb* no reference seems to have been made, either in the argument or in the judgment of the Master of the Rolls, to sub-sect. 3 of sect. 24 of the *Judicature Act*, 1873 (3). The words of that sub-section are as wide as possible, and if the rules are inconsistent with it, they cannot repeal the Act. But there is no inconsistency: Order XIX., r. 3.

[FRY, J.:—You say that the words "in any suit instituted for that purpose by the same defendant against the same plaintiff" include an action brought after the original action?]

Yes. A counter-claim is a distinct thing from a set-off; it is not governed by the same rules or subject to the same limitations.

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(1) 14 Ch. D. 542.

(2) 5 Ch. D. 713.

(3) Sect. 24, sub-sect. 3, provides that "The said Courts respectively, and every Judge thereof, shall also have power to grant to any defendant in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right, or title claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading, and as the said Courts respectively, or any Judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner."

Order XIX., rule 3, provides that, "A defendant in an action may set off, or set-up, by way of counter-claim against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross-action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross-claim."

The decision in *Fritz* v. *Hobson* (1) is in principle inconsistent with that in *Original Hartlepool Collieries Company* v. *Gibb* (2). The old rule of law that nothing subsequent to the issue of the writ could be considered did not apply only to damages; but Courts of Equity were not limited to dealing only with the rights of the parties as they existed at the time of the filing of the bill. And now, under the Judicature Acts, the rules of equity are to prevail. On principle, why should the right of the Defendant be cut down to suit the convenience of the Plaintiff? The Plaintiff can put the new matter in issue by his reply or by amendment. The decision in *Original Hartlepool Collieries Company* v. *Gibb* unduly narrows the effect of the *Judicature Act*.

As to Order XX., on which the Master of the Rolls relied, it enables a defendant to plead by his statement of defence matters arising since the commencement of the action; no such provision is made with regard to a counter-claim, because the right was already given by sub-sect. 3 of sect. 24 of the Act.

[*Cookson*, Q.C., referred to *Vavasseur* v. *Krupp* (3), in which the Master of the Rolls held that, if a plaintiff discontinues his action, the defendant's counter-claim is also at an end; and to *Child* v. *Stenning* (4).]

When rule 3 of Order XIX. says that the Defendant may set up by way of counter-claim "any right or claim," it is implied that the counter-claim may go beyond the original claim. The Master of the Rolls does not say that this cannot be done; he bases his decision on convenience, not on want of jurisdiction.

[*Cookson*, Q.C., referred to the judgment of Lord Chief Justice *Cockburn* in *Stooke* v. *Taylor* (5).]

The Plaintiffs have not taken this objection by their reply.

Cookson, Q.C., and *E. S. Ford*, for the Plaintiffs:—

Rule 3 of Order XIX. says that "a counter-claim shall have the same effect as a statement of claim in a cross-action." A cross-action meant an independent action between the same parties, the damages in which could be set off against the damages in the original action: *Stooke* v. *Taylor* (1). There has been a considerable difference of opinion among the Judges as to the effect of an order that the costs should abide the event in the case of a claim and counter-claim: *Chatfield* v. *Sedgwick* (2); *Neale* v. *Clarke* (3); *Potter* v. *Chambers* (4).

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(1) 14 Ch. D. 542.
(2) 5 Ch. D. 713.
(3) 15 Ch. D. 474.
(4) 5 Ch. D. 695; 11 Ch. D. 82.
(5) 5 Q. B. D. 569.

[FRY, J., referred to *Winterfield* v. *Bradnum* (5).]

We admit that we feel a difficulty in arguing the point, but we rely on *Original Hartlepool Collieries Company* v. *Gibb* (6), which is the decision of a Court of co-ordinate jurisdiction.

FRY, J.:—

The point which now arises for my determination is one upon which the present Master of the Rolls has, in *Original Hartlepool Collieries Company* v. *Gibb*, expressed a decided opinion. He has held that the damages claimed by a counter-claim must be limited to the date when the writ in the original action was issued. The result of that, of course, is this, that a counter-claim can never extend to any right of action subsequent to the date of the original writ. The point is one of very great importance as regulating the procedure under the Judicature Acts, and as I have the misfortune to differ in opinion from the Master of the Rolls, I desire to encourage an application to the Court of Appeal, in order that the question may be finally determined. I need hardly say that, in differing as I do from that learned Judge, I do so with the greatest deference and the greatest doubt of the correctness of my own opinion, but, having a clear opinion of my own upon this matter, I think it desirable and right to express it.

The right of counter-claim is created by the 3rd sub-section of the 24th section of the *Judicature Act* of 1873. [His Lordship read it.] These words are of the utmost generality, and they appear to me to give an independent right to the defendant to commence an independent action against the plaintiff; and I find nothing whatever in them, either in letter or in spirit, which con-

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(1) 5 Q. B. D. 569, 582.
(2) 4 C. P. D. 459.
(3) 4 Ex. D. 286.
(4) 4 C. P. D. 457.
(5) 3 Q. B. D. 324, 326.
(6) 5 Ch. D. 713.

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fines the right of the defendant to some cause of action vested in him when the plaintiff commenced his original action.

Then, when I turn to the Orders which regulate the forms of pleading, I can find nothing in them which, as it seems to me, interferes with the generality of the words of the Act. [His Lordship read rule 3 of Order XIX.] It is, to my mind, evident that there is no intention to confine the claim made by the counter-claimant to damages, or to an action of the same nature as the original action, and therefore, when it is said that the defendant may set up against the claim of the plaintiff a claim of his own, it does not necessarily mean that the claims are to be *ejusdem generis,* because it says expressly "whether such counter-claim sound in damages or not." The plaintiff's right may be in damages; the defendant's right may be to an injunction or to any other equitable relief not sounding in damages; and therefore there is nothing to confine the defendant's claim to something in the nature of set-off or to setting up against the claim of the plaintiff merely something which counteracts that claim. It is quite true that in Order XX. provision is made to enable the defence to be brought down to a date later than the commencement of the action, and the Master of the Rolls has from that inferred that a counter-claim, not being mentioned in that rule, cannot extend down to the same date as a defence. But I read that rule in a very different way. I think that it introduces this liberty with regard to a defence only, because the liberty was already given by the statute with regard to a counter-claim, and therefore it was unnecessary for the rule to make any reference to a counter-claim. And I cannot help observing that the construction of the Master of the Rolls appears to be open to this very serious objection, that it requires a defendant who has two causes of action, the one arising before, and the other arising after, the date of the original writ, to split his causes of action; the one he may ventilate by means of a counter-claim, in respect of the other he must issue an independent writ.

Now, I think that the general spirit of the Judicature Acts is to prevent multiplicity of litigation, and especially to prevent multiplicity of procedure, and to enable parties to settle, so far as may be, by one hearing and one judgment, all the questions in contro-

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versy between them. If I confine the ambit of the counter-claim to causes of action arising before the original writ, I interfere in many cases with the power of the defendant so to obtain by one single adjudication the settlement of all questions between himself and the plaintiff.

But I am very much confirmed in the view which I take by the case of *Stooke* v. *Taylor* (1), to which Mr. *Cookson* has called my attention. There I find a reference to the earlier case of *Winterfield* v. *Bradnum* (2), where the Lord Justice *Brett* said this (3): "A counter-claim is sometimes a mere set-off; sometimes it is in the nature of a cross-action; sometimes it is in respect of a wholly independent transaction. I think the true mode of considering the claim and counter-claim is, that they are wholly independent suits which, for convenience of procedure, are combined in one action." I take the liberty of saying that I concur entirely in that view. It seems to me to be a sound expression of the result of the Judicature Acts. The late Lord Chief Justice *Cockburn*, also, in *Stooke* v. *Taylor*, said this (4): "The law as to the difference between set-off and counter-claim is correctly stated by Mr. *Pitt Lewis* in his very useful work on County Court Practice (5). 'A set-off,' he says, 'would seem to be of a different nature from a defence, inasmuch as a set-off appears to shew a debt balancing the debt claimed by the plaintiff; and thus leaving nothing due to him; while a counter-claim, it would seem, consists of a cross-claim, not necessarily extinguishing or destroying the plaintiff's demand. In other words, a set-off appears to consist of a defence to the original claim of the plaintiff; a counter-claim is the assertion of a separate and independent demand, which does not answer or destroy the original claim of the plaintiff. The right to rely on a set-off has long existed. The right to set up a counter-claim was first given by the Judicature Acts.'"

I will refer to another passage in the judgment of the Lord Chief Justice (6): "This reasoning does not apply to a counter-claim, the effect of which, as distinguished from a mere set-off, is altogether different. It is, as I have already pointed out, to all intents and purposes an action by the defendant against the plaintiff." In that view again I take the liberty of saying I entirely concur.

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(1) 5 Q. B. D. 569.
(2) 3 Q. B. D. 324.
(3) Ibid. 326.
(4) 5 Q. B. D. 577.
(5) Page 321.
(6) 5 Q. B. D. 576.

The Master of the Rolls has, no doubt, in *Vavasseur* v. *Krupp* (1) held that a counter-claim fails or falls to the ground with the original action. But, if the view of the late Lord Chief Justice of *England* and of Lord Justice *Brett*, and also, I may add, of Mr. Justice *Manisty* in *Stooke* v. *Taylor* (2), be the correct one, viz., that the counter-claim constitutes a wholly independent action, it would seem, to say the least, doubtful whether the decision in *Vavasseur* v. *Krupp* is correct. I refer to it only for the purpose of adding that it appears to me that the decision is one of great inconvenience, because the result is this, that if a defendant chooses to bring an independent action against the plaintiff he can go on with it, whether the plaintiff proceeds with his action or not; whereas, if the defendant states the same cause of action by way of counter-claim, his right to recover in that action, however great may have been the expense in preparing for it, is defeated by the plaintiff's simply dropping his original action. I will say no more than that I do not feel that I ought, on the ground of that decision of the Master of the Rolls, to abstain from expressing the opinion which I have expressed with regard to the present case.

I repeat that I am very anxious that the matter should be decided by the Court of Appeal. But, meanwhile, I think it is my duty, considering that the matter is one of great general interest, and one upon which, as it appears to me, the Courts have differed, to act on my own opinion. Therefore I shall allow Mr. *Beaumont* to proceed with that part of his case which arises subsequently to the issue of the Plaintiffs' writ.

Beaumont, for the Defendant:—

Even if a man is wrongfully in possession of a house it is a breach of the law for the rightful owner to enter forcibly, and the man who is forcibly turned out is entitled to damages: 5 Rich. 2, stat. 1, c. 8; *Newton* v. *Harland* (3); *Hillary* v. *Gay* (4).

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(1) 15 Ch. D. 474.

(2) 5 Q. B. D. 569.

(3) 1 Scott, N. R. 474.

(4) 6 Car. & P. 284.

Cookson, Q.C., and *E. S. Ford*, for the Plaintiff:—

The only remedy under the statute of Rich. 2 is by indictment.

[FRY, J.:—But the statute makes the forcible entry wrongful, and a possession obtained by force cannot be justified.]

In the present case the Defendant was in possession of the house only as the servant of the Plaintiffs, and therefore his possession was their possession; they were entitled to smash in their own door. On the evidence, the right conclusion is that *Robertson* obtained possession in the first instance peaceably, and that then by a trick the Defendant regained actual possession. This subsequent entry was a mere trespass. Indeed, as soon as *Robertson* entered with the intention of taking possession, he was in contemplation of law in actual exclusive possession, and the Defendant became a mere trespasser: *Jones* v. *Chapman* (1).

[FRY, J., referred to *Bacon's* Abr., tit. Forcible Entry (2), "If two are in possession of a house, and the one enters by one title, and the other by another, he that hath right shall be supposed to be in the possession."]

Jones v. *Chapman* was approved by Lord *Selborne* in *Lows* v. *Telford* (3).

[FRY, J.:—*Robertson* did not tell the Defendant to go at once, he carried on a conversation with him; therefore he gave him an implied license to remain in the house until the end of the conversation.]

But *Robertson* came there in order to take possession, and the license, if there was one, was determined so soon as the Defendant went back into the house and locked the door, shutting out *Robertson*. The Defendant then became a trespasser, and a trespasser *ab initio*: *The Six Carpenters' Case* (4). The license was only to remain so long as the Defendant did nothing to defeat the purpose for which *Robertson* came there, and when the Defendant excluded *Robertson* he became a trespasser *ab initio*.

[FRY, J.:—The difficulty I feel is as to the injury you did to the Defendant's furniture.]

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(1) 2 Ex. 803, 820.

(2) 7th Ed. vol. iii. p. 718.

(3) 1 App. Cas. 414, 426.

(4) 1 Sm. L. C. 8th Ed. p. 143.

Newton v. *Harland* (1) must be considered no longer law. In *Davis* v. *Burrell* (2), *Cresswell*, J., during the argument, said (3), referring to *Newton* v. *Harland*, "The doctrine of that case has been very much questioned."

[FRY, J.:—The question in *Newton* v. *Harland* was not whether an action could be brought for the forcible entry, but whether the Defendant could justify an assault on the Plaintiff's wife by turning her out of the house with violence. I do not think that such a thing as an action for forcible entry is to be found in any of the books. That is because the statute makes a forcible entry indictable.]

But the ground of the decision in *Newton* v. *Harland* was that a forcible entry by the rightful owner was not justifiable. That doctrine cannot now be sustained. It was disapproved by both Baron *Parke* and Baron *Alderson* in *Harvey* v. *Brydges* (4). Baron *Parke* said (5), "If it were necessary to decide it, I should have no difficulty in saying that where a breach of the peace is committed by a freeholder, who, in order to get into possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for forcible entry, he is not liable to the other party." And Baron *Alderson* said (6), "I have still the misfortune to retain the opinion that I expressed in *Newton* v. *Harland*, although the majority of the Court of Common Pleas have held the contrary." *Harvey* v. *Brydges* was referred to with approval by Lord *Selborne* in *Lows* v. *Telford* (7).

[FRY, J.:—*Harvey* v. *Brydges* was an action for trespass to land.]

Pollen v. *Brewer* (8) is also inconsistent with *Newton* v. *Harland*. It was there held that a trespasser could not recover damages for his expulsion by the rightful owner, but that he could recover damages for an assault committed on himself and his wife in the course of the expulsion. But that was because the assault was unnecessary. This shews that no civil action will lie for putting out the Defendant's furniture, and it is a complete answer to the Defendant's claim for damages. Another answer is, that the Defendant was in possession of the house only as the servant of the Plaintiffs; his possession of the house was ancillary to his possession of the nursery as manager.

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(1) 1 Scott, N. R. 474.
(2) 10 C. B. 821.
(3) Ibid. 825.
(4) 14 M. & W. 437.
(5) 14 M. & W. 442.
(6) Ibid. 443.
(7) 1 App. Cas. 426.
(8) 7 C. B. (N.S.) 371, 6 Jur N.S. 509

[FRY, J.:—He was allowed to have exclusive possession of the house for the use of himself and his family. The Plaintiffs could not have walked into the house at any moment against the will of the Defendant.]

Beaumont, in reply, as to the cases cited:—

Newton v. *Harland* (1) is unanswered; the very question of justification which is raised now arose then. *Hillary* v. *Gay* (2) is to the same effect. *Davis* v. *Burrell* (3) has no application; the passage cited is a mere *dictum* during the argument. If a case has not been overruled it cannot be disregarded because it has been questioned. The observations cited from *Harvey* v. *Brydges* (4) are those of the two Judges who tried *Newton* v. *Harland*, and whose view was overruled by the Court in Banc. And they both said that in *Harvey* v. *Brydges* the point which was raised in *Newton* v. *Harland* did not arise for decision. *Pollen* v. *Brewer* (5) does not really conflict with *Newton* v. *Harland.*

It was held that the plaintiff was entitled to recover damages for an assault committed during his forcible eviction by the defendant.

On the evidence it is not sufficiently proved that *Robertson* acquired possession; when the Defendant got back into the house he was remitted to his original possession before the conversation with *Robertson*: *Lows* v. *Telford* (6). Such a possession is protected by the law. The Defendant's possession was not that of a mere servant, *i.e.*, the possession of his master. It was an exclusive possession, like that of a lodge-keeper who is allowed to live with his family in the lodge at a park gate.

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(1) 1 Scott, N. R. 474.
(2) 6 Car. & P. 284.
(3) 10 C. B. 821.
(4) 14 M. & W. 437.
(5) 7 C. B. (N.S.) 371. 6 Jur. N. S
(6) 1 App. Cas. 414, 421.

Fry, J., gave judgment for the Plaintiff on the claim, with costs, and dismissed the counter-claim, except as to the claim for damages in respect of the alleged forcible entry and injury to the Defendant's furniture, upon which he reserved his judgment.

March 8. Fry, J.:—

The question which I reserved for further consideration arises on the Defendant's counter-claim. [His Lordship read the allegations as to the forcible entry, and the claim for damages founded upon it.] The claim subdivides itself into two heads, the one for the forcible entry and eviction, the other for the injury done to the Defendant's furniture and effects, and, in my judgment, separate considerations arise with regard to these two heads. According to the evidence the Defendant was, in my judgment, in possession of the house by leave of the owners, it having been occupied by him as the manager of the nursery. He was not in possession of the house in the same sense as he was in possession of the nursery; with regard to the nursery he was in the position of an ordinary servant, being only the manager for the Plaintiffs; but he was by the Plaintiffs' permission in the exclusive possession of the house. That permission, however, had been withdrawn before the 8th of January, and the Defendant had retained possession and was then in possession as a wrongdoer. Upon the evidence I come to the conclusion that a forcible entry was made by *Robertson* on the 8th of January as agent of the Plaintiff *Poulton* only, but that the Plaintiff *Beddall* had nothing to do with it. Different accounts of what took place are given by *Robertson* and by the Defendant, but it appears to me immaterial which account is true, for in either view the Defendant's possession at the time when the forcible entry was made was wrongful. The questions which then arise are complicated by this consideration, that, if the possession of the Defendant was unlawful, the forcible entry of the Plaintiff was also unlawful. The taint of unlawfulness attaches to them both. The unlawfulness of the Plaintiff's entry arises under the statute 5 Rich. 2, stat. 1, c. 8, which enacts, "That none from henceforth make any entry into any lands and tenements, but in case where entry is given by the law; and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner. And if any man from henceforth do to the contrary, and thereof be duly convict, he shall be punished by imprisonment of his body, and thereof ransomed at the King's will." This statute creates one of the great differences which exist in our law between the being in possession and the being out of possession of land, and which gave rise to the old saying that possession is nine points of the law. The effect of the statute is this, that when a man is in possession he may use force to keep out a trespasser; but, if a trespasser has gained possession, the rightful owner cannot use force to put him out, but must appeal to the law for assistance. And the result of the cases appears to me to be this, that, inasmuch as the possession of the Defendant was unlawful, he can recover no damages for the forcible entry of the Plaintiff. He can recover no damages for the entry, because the possession was not legally his, and he can recover none for the force used in the entry, because, though the statute of Rich. 2 creates a crime, it gives no civil remedy. But, in respect of independent wrongful acts which are done in the course of or after the forcible entry, a right of action does arise, because the person doing them cannot allege that the acts were lawful, unless justified by a lawful entry; and he cannot plead that he has a lawful possession. This, as it appears to me, is the result of the cases. The leading authority on the subject is *Newton* v. *Harland* (1), a case in which a great difference of opinion was evinced between the learned Judges before whom it came. It was tried three times, first before Baron *Parke*, secondly before Baron *Alderson*, and thirdly before Mr. Justice *Coltman*, and came three times before the Court of Common Pleas in Banc, and it must, in my judgment, be taken as having settled the law on the subject. The action was brought to recover damages for an assault committed on the plaintiff's wife in the course of a forcible entry by the defendant into some apartments which had been occupied by the plaintiff as tenant to the defendant. The plaintiff remained in the apartments after the expiration of his term, and the defendant entered by force and turned out the plaintiff's

(1) 1 Scott, N. R. 474.

wife and family, and in so doing assaulted the wife. The defendant pleaded that the acts were done in defence of his possession of the house, and the Court of Common Pleas held, contrary to the opinions of Baron *Parke* and Baron *Alderson*, that the defence failed, because the defendant's entry was unlawful. On the other hand, when the cause of action alleged is simply the eviction, no damages can be recovered. That is the result of *Pollen* v. *Brewer* (1), and it is also clear from other cases. No doubt, in *Harvey* v. *Brydges* (2), Baron *Parke* and Baron *Alderson* expressed their disapproval of *Newton* v. *Harland* (3), but they were the Judges who had tried that case, and whose opinions had been overruled by the Court in Banc. In *Davison* v. *Wilson* (4)—an action for eviction—it was held that the averments in the declaration "with force and arms, with a strong hand, and against the form of the statute," were, on the pleadings, allegations of matter of aggravation only, and not of a separate cause of action, and therefore the plea of *liberum tenementum* prevailed. The case of *Meriton* v. *Coombes* (5), in my opinion, supports the same view. The only other case to which it is necessary for me to refer is *Lows* v. *Telford* (6). There the action was brought for a malicious prosecution. The defendant, who was the mortgagee in fee of certain premises which the plaintiffs had been allowed by the mortgagor to occupy, entered into actual possession of the premises by forcing the lock of the outer door in the absence of the occupiers. The plaintiffs then entered by force and ejected the defendant. The defendant indicted them for a forcible entry, and they were acquitted. They then brought the action against the defendant for a malicious prosecution. It was held by the House of Lords that they could not sustain the action, on the ground that there was reasonable cause for the indictment, because the statute makes a forcible entry equally unlawful whether the person in possession is or is not the lawful owner of the property. I think that none of those cases in any way countervail *Newton* v. *Harland*, which I take to have established this, that there is a good cause of action whenever in the course of a forcible entry there has been committed by the person who has entered forcibly an independent wrong, some act which can be justified only if he was in lawful possession. I come, therefore, to the conclusion that, in respect of his claim for damages for the forcible entry and eviction, the Defendant cannot succeed, but that, in respect of his claim for damages for the injury done to his furniture, which the Plaintiff could only justify by a lawful possession, the Defendant is entitled to succeed. I shall refer it to Chambers to ascertain the amount of the damages. With regard to the costs, I have already dismissed the rest of the counter-claim, and I am giving the Defendant only a very small portion of the relief which he asked. I must either apportion the costs of the counter-claim, or I must give the relief without costs. I think the latter course the preferable one.

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(1) 7 C. B. (N.S.) 371. 6 Jur NS 509
(2) 14 M. & W. 437.
(3) 1 Scott, N. R. 474.
(4) 11 Q. B. 890.
(5) 9 C. B. 787.
(6) 1 App. Cas. 414.

Solicitor for Plaintiffs: *F. C. Tudor.*
Solicitor for Defendant: *G. Johnson.*

W. L. C.

Ex parte FURBER. *In re* KING.

C. J. B.
1881
March 14.

Debtor's Summons—Liquidated Demand—Equitable Mortgage by Deposit—Interest—Bankruptcy Act, 1869, *s.* 6.

In April, 1879, *A.* deposited title deeds with *B.* to secure repayment of an advance of £1000, and an agreement was at the same time executed that the deeds should be held as an equitable security for payment, on the 15th of July, 1879, of the £1000 and interest at 7½ per cent. per annum, and also that *A.* should execute to *B.* a legal mortgage of the property, with power of sale and such other powers as *B.* might require for further securing payment of the money which should then be owing on the security of the agreement, "with interest for the same after the rate aforesaid."

In January, 1881, *B.* took out a debtor's summons for £150, on the footing that interest continued to be paid at the rate of 7½ per cent. down to the date of demand, and not merely until the 15th of July, 1879 (in which case the debt would have been under £50):—

Held, that the agreement amounted to a contract that if the £1000 was not repaid in July, 1879, interest at 7½ per cent. should continue to be paid, and accordingly that there was a liquidated demand of sufficient amount within the *Bankruptcy Act*, 1869, s. 6, to support the debtor's summons.

APPEAL from an order of the *Wandsworth* County Court dismissing with costs a debtor's summons by Messrs. *Furber & Price* against *Henry King* for payment of £150, being the balance of a sum of £1202 8*s.* 2*d.*, the amount of principal and interest, costs, charges, and expenses for money lent to *King* by *Furber & Price*, and interest thereon, &c., between the 15th of April, 1879, and the 28th of December, 1880, after allowing £1052 8*s.* 2*d.*, the estimated value of a security held by them over freehold property of *King* by memorandum of equitable deposit of the 15th of April, 1879.

King was a builder at *Balham*, and in April, 1879, Messrs. *Furber & Price*, who were auctioneers and estate agents, advanced to him £1000, which, under an authority from him, they paid over to a Mr. *Kisch*. In exchange, *Kisch* handed over to *Furber & Price* the title deeds of property belonging to *King* at *Balham*. This money was stated to have been advanced solely as a temporary advance pending the realization of the property, and if the property did not sell, *Furber & Price* were to be paid back immediately.

By an agreement, dated the 15th of April, 1879, between *King* and Messrs. *Furber & Price*, it was agreed that, in consideration of the advance of £1000, the title deeds deposited with *Furber & Price* should be held by them as an equitable security for the payment by *King* to *Furber & Price*, on the 15th of July, 1879, of the sum of £1000, with interest thereon after the rate of £7 10*s*. per cent. per annum, to be computed from the date thereof. And *King* thereby charged all the hereditaments and premises comprised in the said muniments respectively with the payment to *Furber & Price* of the £1000, and of interest thereon after the rate aforesaid, and also agreed, at the request of *Furber & Price*, but at his own cost, to execute to them a legal mortgage of the said hereditaments and premises, in such form and with such power of sale and other powers and provisions as they might require for further securing the payment as aforesaid of the money which should then be owing on the security of this agreement, with interest for the same after the rate aforesaid. It was also agreed that *Furber & Price* should and might, at their discretion, without any further consent or concurrence by or on the part of *King*, forthwith, or at any time before the 24th day of May, 1879, sell and absolutely dispose of all or any part of the property, &c., comprised in or otherwise assured by the deposited title deeds, by public auction or by private contract, but if by public auction, then subject to a reserved bidding of not less than £1500. And in the event of any such sale, whether as thereinbefore or thereinafter mentioned, *Furber & Price* were to retain out of the proceeds their commission and percentage of 3 per cent. and cost of plans upon the entirety of the moneys to be received upon any such sale, and so in proportion in the event of any sale of any part, not being the entirety of the said hereditaments; such percentage of 3 per cent. to include all disbursements and outgoings except costs of plans, and in the event of the property not being sold, the sum of £20, and also the expenses of advertising, and other expenses; and also in the event of a sale, to repay to themselves the sum of £1000, and all interest thereon which for the time being should be due and owing on the security of those presents, or so much as should be actually received, and after and subject to all the aforesaid payments, to pay over the residue and surplus (if any) to *Henry King*, or as he should appoint. If from any cause whatever all such principal money and interest, costs, charges, and expenses should not be fully paid and satisfied to the said *Furber & Price* on the 15th of July then next, then and in such case it should and might be lawful for *Furber & Price*, in manner aforesaid, to sell and dispose of all the said hereditaments and premises, or so much and such part thereof as should not have been sold at or for the price or prices as could be obtained for the same, and without any obligation as to any reserved price or bidding, but otherwise with all the indemnities thereinbefore mentioned and contained, and subject to the same or the like trusts as thereinbefore contained in relation to the disposition of the purchase-money.

In August, 1879, the property was put up for sale but not sold, and the expenses of the attempted sale were stated to be £74 6*s.* 6*d.*

On the 8th of February, 1881, *Furber* issued a debtor's summons in the *Wandsworth* County Court against *King* for £150, which was thus made up:—

£128	1	8	(Interest at 7½ per cent. from the 15th of April, 1879—28th of December, 1880, the date of the demand).
74	6	6	Expenses of sale.
1000	0	0	Principal money.
2002	8	2	
1052	8	2	Value of security deducted.
£150	0	0	

It was objected at the hearing in the County Court that there was no liability for interest after the 15th of July, 1879, and that any further claim in that respect was recoverable, not as interest under the agreement, but as damages for breach of the agreement to repay the money by the 15th of July, 1879. Accordingly the liquidated amount, being below £50, was not

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sufficient to support a debtor's summons, the account being thus stated:—

£18	15	0	(Interest at 7½ per cent. from the 15th of April —15th of July, 1879).
74	6	6	Expenses of sale.
1000	0	0	Principal money.
1093	1	6	
1052	8	2	Value of security deducted.
£40	13	4	

The Registrar, adopting this view, had dismissed the debtor's summons with costs.

Attenborough, for the Appellant *Furber*:—

There being a binding agreement to execute a legal mortgage "with interest at the rate aforesaid," *Furber* stands in the same position in equity as if a legal mortgage with the usual provision for payment of interest had been actually executed, and he is therefore entitled to interest at 7½ per cent. from the date of the agreement, April, 1879, until the time of demand (28th December, 1880); so that there is a liquidated sum due to him sufficient to render non-compliance with the debtor's summons an act of bankruptcy within the *Bankruptcy Act*, 1869, s. 6, sub-s. 6.

Independently of the agreement to execute a mortgage, or any stipulation as to interest, the mere deposit of deeds to secure a simple contract implies an agreement to pay interest: *In re Kerr's Policy* (1); *Carey* v. *Doyne* (2), which cases were not cited in *Cook* v. *Fowler* (3), which was relied on in the County Court.

Yate Lee, for the Respondent:—

The Appellant has not shewn that there is a liquidated debt due to him of sufficient amount to support a debtor's summons. It is not the case of an ordinary equitable mortgage by deposit, but a merely temporary advance with an agreement which came to an end on the 15th of July, by which time it was in the con-

(1) Law Rep. 8 Eq. 331.
(2) 5 Ir. Ch. Rep. 104.
(3) Law Rep. 7 H. L. 27.

templation of both parties that the property would have been sold and the advance repaid out of the proceeds; and the Court will not imply a further contract for continuance of interest at the same rate after the day fixed for payment: *Cameron* v. *Smith* (1). Interest not being reserved after that day, any claim by *Furber* against *King* is recoverable, not as interest under the agreement, but as damages for non-performance of the contract to repay the advance on the 15th of July, 1879: *Cook* v. *Fowler* (2); *Wms. Saund.* (3) (citing *Attwood* v. *Taylor* (4)); and is not a good petitioning creditor's debt: *Ex parte Greenway* (5). In any case, the interest after the 15th of July, 1879, will be limited to 5 per cent.: *In re Roberts* (6); *Webster* v. *British Empire Mutual Life Assurance Company* (7).

BACON, C.J.:—

The simple question is whether this charge for interest is properly made under the facts of the case. The contract between the parties is for an advance of £1000, in the prospect, no doubt at that time contemplated, of a speedy sale being made by these auctioneers, with payment of interest at 7½ per cent. up to the 15th of July, 1879. But that is not all the contract, the creditor says, "You shall pay me back my £1000 at 7½ per cent. on that day in July, or, unless you do, you shall undertake to make me a legal mortgage, securing to me my £1000 and interest for the same after the rate aforesaid." Can there be anything in words or practice that more clearly constitutes a liquidated debt than the agreement between the parties that it shall be considered as a liquidated debt by the terms of their contract? The principle has always been plainly expressed, viz., that you cannot imply a contract to pay a certain rate of interest. I quite agree that that is plain law. It cannot be implied, but the rate of interest may be made out by a written contract, and here I find a distinct written contract that the principal money and interest at the rate of 7½ per cent. shall be paid on a certain day, and if

(1) 2 B. & A. 305.

(2) Law Rep. 7 H. L. 27, 35.

(3) Vol. i. p. 201, n.

(4) 1 Man. & G. 279 317.

(5) Buck, 412.

(6) 14 Ch. D. 49.

(7) 15 Ch. D. 169.

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it is not then so paid the deposit shall constitute an equitable security liable to be converted into a legal security containing proper covenants such as are contained in all well-drawn mortgage deeds for the payment of the principal and the interest at the rate at which the parties may have agreed. Every case that has been cited involves the principle, and the cases have established that where no interest has been stipulated, nevertheless the depositee or the mortgagee has a right to interest. The Master of the Rolls so dealt with it in *In re Roberts* (1), where a large rate of interest had been stipulated to be given in a given time, and a bond given for the amount. A bond was given and the money was not paid, and the borrower continued to pay interest at that rate and afterwards died. Upon proof of the mortgagee's debt in the suit to administer his estate, the Master of the Rolls, acting as Judge and jury, estimated the damages which, upon the written instrument, the creditor was entitled to charge, and he found that 5 per cent. was enough. There was nothing to be implied in that case from the fact that a day had been fixed for payment of interest at 10 per cent. There was no stipulation in that case that the interest thereof should be paid "at the rate aforesaid." My decision therefore rests wholly upon the written contract between the parties. It has been urged that the agreement has not got a mortgage stamp, but it is not necessary that it should have. A sixpenny stamp complies with the law so as to validate a written contract between any of the parties. Here I find a plain contract between the parties that interest at the rate of 7½ per cent. should be payable while the principal remains unpaid, and, therefore, in my judgment (not failing to notice the several cases which have been referred to, and not forgetting that although the Courts have declined to imply a contract, yet they have never refused to recognise a written contract), the contract is to be read to the effect that it contains a written engagement to pay interest at the rate stipulated for in the original security which constitutes a sufficient liquidated debt due at law or in equity, under the *Bankruptcy Act*, 1869, s. 6. The written agreement is sufficient to establish a plaintiff's right to ask for interest at the rate of 7½ per cent. in an action at law. In equity nobody can doubt

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(1) 14 Ch. D. 49.

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that it would have the same effect. It was the absence of a contract in *In re Roberts* (1) which enabled the Master of the Rolls to exercise the functions of a Judge and jury, and to assess the amount of the damages. Even if there was a right to reduce the rate of interest to a lower amount (I am assuming that the Registrar had power to reduce the interest), or if the debtor had succeeded in reducing the amount, there would still remain a debt of more than £50, which is sufficient for a petitioning creditor's debt. If there is a legal question to be decided between the parties, the Registrar might have ordered security to be given, or he might have stayed the proceedings. Any question of that kind is not to be decided now. It will have to be decided whenever the proof comes in under the bankruptcy; and if when he seeks to prove for the amount of his debt at the rate of 7½ per cent. it is shewn that he is not entitled to that amount of interest, that will be another question. But as matters now stand, he has shewn that he has a claim amounting to three times as much as is necessary to prove a petitioning creditor's debt. Being of opinion, therefore, that the petitioning creditor's debt is a debt beyond the amount which the statute requires, I must discharge the order appealed from with costs.

Solicitors: *R. Furber*; *Rodgers & Clarkson.*

(1) 14 Ch. D. 49.

F. G. A. W.

C. A.

1881

V. C. M.

Jan. 11.

C. A.

Feb. 16.

18 Ch D 459

19 Ch D 96

23 Ch D 511

514-9

CAPE BRETON COMPANY *v.* FENN.

[1880 C. 3737.]

Winding-up—Leave to sue in Name of Company.

An order was made on the application of *R.*, in a winding-up, directing that he should receive his costs of the application out of the assets. *H. & Co.* were his solicitors in this application, but had no other connection with the company or its affairs. The costs were not paid, and *R.* became bankrupt. Subsequently *Malins*, V.C., made an order, on the application of *H. & Co.*, that they should be at liberty, on giving such indemnity as the Judge should direct, to institute such proceedings as they might be advised against the former directors and promoters, to recover certain sums from them, the applicants undertaking to pay into the bank to the credit of the liquidators whatever was recovered, and also to abide by any order the Court or Judge might make as to the costs of such proceedings. *H. & Co.* thereupon commenced this action in the name of the company, against the former directors and promoters, without having taken any steps to have the indemnity fixed by the Judge. The Defendants moved that all further proceedings might be stayed, or the suit and all proceedings under it set aside, on the ground that the action had been commenced without proper authority. This application was refused by *Malins*, V.C., who expressed his opinion that the undertaking of *H. & Co.*, contained in the order, was a sufficient indemnity:—

Held, on appeal, that as *H. & Co.* were strangers to the company, being neither creditors nor contributories, and having no charge on the assets, there was no jurisdiction to give them leave to sue in the name of the company:

Held, also, that if there had been jurisdiction to make such an order, the action would still have been commenced without authority, the condition precedent of *H. & Co.* giving indemnity not having been complied with:

Held, therefore, that the action must be dismissed, as having been instituted without authority, and that *H. & Co.* must pay the costs of all parties, including the official liquidators; the costs of the company being taxed as between solicitor and client, and the other costs as between party and party.

ON the 31st of July, 1875, an order was made for winding up the *Cape Breton Company.* On the 8th of February, 1878, an order was made, on the application of *Michael Rooney*, removing one of the liquidators, and directing payment to *Rooney* of his costs out of the assets of the company. Messrs. *Harper, Broad, & Battcock* were the solicitors of *Rooney* on this application. *Rooney* had since become bankrupt. The costs had been taxed at the sum of £376 19*s.* 4*d.*, but had not been paid.

On the 15th of November, 1880, Vice-Chancellor *Malins,* on the application of Messrs. *Harper, Broad, & Battcock,* made in Chambers an order "That the applicants be at liberty, upon giving such indemnity as the Judge shall direct, to institute such proceedings as they may be advised, in the name and on behalf of the said company, against the former directors and the promoters of the said company, to have it declared that they, or some of them, are liable to pay certain moneys to the said company, and to obtain an order for payment thereof accordingly; the applicants undertaking to pay into the *Bank of England* to the credit of the liquidators whatever moneys they may receive from such former directors and promoters of the said company, or any of them, and also undertaking to abide by any order the Court or Judge may hereafter make as to the costs of and occasioned by such proceedings." Liberty was given to apply as to any moneys which might be paid into the bank by the applicants under their undertaking, or by the former directors or promoters.

Messrs. *Harper, Broad, & Battcock* were neither creditors nor contributories, and had no further interest in the affairs of the company than as above stated.

On the 16th of December, 1880, Messrs. *Harper, Broad, & Battcock* issued the writ in this action against four gentlemen who had been promoters of the company, seeking to have them declared jointly and severally liable to the company for a large sum of money in respect of certain alleged acts of misfeasance, and a statement of claim was delivered at the same time. The action was attached to the Court of Vice-Chancellor *Malins,* and no steps had been taken to have the indemnity fixed by the Judge.

On the 11th of January, 1881, the Defendants moved, before Vice-Chancellor *Malins,* that all further proceedings in the action might be stayed, or the writ and all proceedings thereon be set aside, the same having been commenced without proper authority, and that the Defendants' costs of the action and of the present application might be taxed, and that Messrs. *Harper, Broad, & Battcock* might be ordered jointly and severally to pay the costs, when taxed, to the Defendants and the liquidators of the Plaintiff company.

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Farwell, for the motion, referred to *Morgan* and *Davey* on Costs (1), *Hall* v. *Bennett* (2), and *Hubbart* v. *Phillips* (3).

Norton, for the liquidators, supported the motion.

Higgins, Q.C., and *Northmore Lawrence*, for Messrs. *Harper, Broad, & Battcock*, referred to *In re Bank of Gibraltar and Malta* (4) and *In re Imperial Bank of China* (5).

Malins, V.C.:—

In November last the gentlemen who had acted as solicitors for Mr. *Rooney* in obtaining the order of the 8th of February, 1878, represented to me in Chambers that there was a strong case for making the Defendants liable to refund a considerable sum of money. Mr. *Harper* attended before me, and was confident that if he could use the name of the company he could succeed in the litigation, at all events he was willing to undertake the risk of it. I thought that it was a case in which I was bound to give the parties who made the claim leave to use the name of the company, but of course I could only do so upon the usual terms of their indemnifying the company and the liquidators against the costs of the litigation. I therefore made it part of the order that they should give such indemnity as the Judge should direct. That indemnity would have to be given to the liquidators, because the liquidators instituting these proceedings in the name of the company would be liable for the costs if the Defendants succeeded. If the action was dismissed with costs the liquidators would be liable for those costs, inasmuch as the name of the company was used, and therefore the liquidators were the persons entitled to indemnity against the costs. I cannot see that the Defendants ought to have any indemnity. When they find themselves sued by the liquidators they are entitled to say, "We are sued by the liquidators of an insolvent company, we are entitled to security for costs," and their proper application would have been that the liquidators should give them security. The application should have been against the liquidators. Instead of that, the present application is made, and I am surprised to find the liquidators supporting it. If the action succeeds a large sum of money will be recovered for the benefit of the company, and in my opinion it was the duty of the liquidators to have opposed this application instead of supporting it. If they were dissatisfied with the undertaking of Messrs. *Harper & Co.* they ought to have applied for further security, and the application ought to have been made to me in Chambers, not in Court. Messrs. *Harper & Co.* have undertaken to abide by any order that may be made as to costs, and that is an abundant security for any costs that can have been incurred up to the present time. If the costs hereafter become heavy, it will be open to the liquidators to apply for further security, if they can shew that the undertaking is not sufficient. The present application is, in my opinion, unfounded, and not made in good faith, and I dismiss it with costs.

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(1) Page 62.

(2) 2 S. & S. 78.

(3) 13 M. & W. 702.

(4) Law Rep. 1 Ch. 69.

(5) Law Rep. 1 Ch. 339.

On the 24th of January, 1881, the Defendants applied in Chambers to Vice-Chancellor *Malins* for security for costs, which the Vice-Chancellor refused, saying that he considered the undertaking of Messrs. *Harper* contained in the order of the 15th of November, 1880, a sufficient security.

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The Defendants appealed against the orders of the 11th of January, 1881, and 24th of January, 1881, but it became unnecessary to argue the appeal from the second order. The appeal was heard on the 16th of February.

Davey, Q.C., and *Farwell* (*Moulton* with them), for the Appellants:—

Harper & Co. are strangers to the company, being neither creditors nor contributories, and there was no jurisdiction to give them leave to use the name of the company. Supposing, however, that the order of the 15th of November, 1880, was right, the action is improperly brought, for no application was ever made to the Judge to approve of an indemnity. The action therefore ought to be dismissed as commenced in the name of the company without authority.

Moulton, for other parties.

J. Pearson, Q.C., and *Norton*, for the liquidators, stated that the liquidators disapproved of the action.

Higgins, Q.C., and *Northmore Lawrence*, for *Harper & Co.*:— The order of the 15th of November, 1880, stands, and is not impeached, there being no appeal from it.

[JESSEL, M.R.:—That will not help you if there was no jurisdiction to make such an order. *Harper & Co.* were strangers to the company.]

They were entitled to be paid out of the assets.

[JESSEL, M.R.:—No, the order was to pay *Rooney*.]

The money having been ordered to be paid to *Rooney* in respect of services which they had rendered, they would be entitled to receive it.

[LUSH, L.J.:—I never heard of authority being given to a person to use the name of another unless the person whose name was to be used stood in the relation of trustee to him.]

In a winding-up the Court can allow a creditor or contributory to use the name of the company: *In re Imperial Bank of China* (1); *In re Bank of Gibraltar and Malta* (2).

[JESSEL, M.R.:—Sect. 165 of the *Companies Act*, 1862, enables the Court to take proceedings on the application of a creditor or contributory.]

The case of the *Imperial Bank of China* was not under sect. 165.

[LUSH, L.J.:—In that case the applicants were contributories who had a direct interest.

JESSEL, M.R.:—The liquidators there did not object to the name of the company being used.]

The Court has full control over the liquidators, and can remove them, so *à fortiori* it has control over the use of their name.

[LUSH, L.J.:—Did any solicitor ever before think of obtaining leave to sue in a client's name because the client owed him a bill of costs?]

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(1) Law Rep. 1 Ch. 339.

(2) Law Rep. 1 Ch. 69.

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Harper & Co. are entitled to be paid out of the assets, and have a direct interest in increasing them. The practice in bankruptcy supports our view, for there a creditor can obtain leave to sue in the name of the trustee for the purpose of increasing the assets: *Ex parte Ryland* (1). The costs in the view of a Court of Equity belong to the solicitors: *Ex parte Cleland* (2); so the solicitors have a sufficient interest. Then, as to the indemnity, the Vice-Chancellor considered that the indemnity given was sufficient.

[JESSEL, M.R.:—The sufficiency of the indemnity has never been inquired into in the regular way.

COTTON, L.J.:—The order directs indemnity to be given, and also directs the applicants to abide by such order as the Court may make as to costs. That assumes the latter direction not to satisfy the first.]

The Vice-Chancellor has explained what he meant by his own order. Then we say that the objection does not lie in the mouth of the Defendants, their only interest is to see that the action was authorized by the Court. Whether an indemnity has been given to the company is no concern of theirs, the indemnity not being for their benefit.

[JESSEL, M.R.:—The leave was conditional, and if the condition has not been complied with there is no leave.]

The indemnity of Messrs. *Harper & Co.'s* undertaking was one which the Judge could accept under the terms of the order, and he has approved of it as sufficient. The order directs such indemnity as the Judge shall direct, and the Judge having stated his opinion that no further indemnity is requisite, the condition of the order is satisfied.

JESSEL, M.R.:—

This is an appeal from an order of Vice-Chancellor *Malins* refusing to set aside the proceedings in a certain action brought in the name of the *Cape Breton Company, Limited*, against certain gentlemen alleged to have been promoters of the company, with the view of making them liable for certain alleged misfeasances.

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(1) 2 Dea. & Ch. 392.

(2) Law Rep. 2 Ch. 808.

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The simple ground upon which the application was made was that the company had not authorized the suit, that it was instituted by Messrs. *Harper, Broad, & Battcock* with a view to recover certain costs, and without any authority from the company. Of course, if that allegation is well founded, the application in the Court below ought to have succeeded. The only question is, whether the solicitors had authority to institute the suit in the name of the company. It is not the ordinary question whether there was actual authority given by the company or not, because the company was in liquidation under a winding-up order, and no authority is alleged to have been given by the company itself or by the board of directors. On the part of the solicitors who have instituted the action there is no concealment, nor any pretence of authority from the company itself. They obtained an order from Vice-Chancellor *Malins* in Chambers in the matter of the winding-up of the company, on which they rely as authorizing them to bring this action. Upon that two points arise for discussion. First of all, whether there was any jurisdiction to make the order, and, secondly, even assuming that there was such jurisdiction, whether the order was not conditional, and whether there has not been a failure to comply with the condition. If either of these questions is answered adversely to the solicitors, the proceedings in the action were altogether unauthorized. In my opinion both should be answered adversely to them.

I will first of all take the smaller question, on which the discussion took place in the Court below. [His Lordship stated the order of the 15th of November, 1880.] It is admitted that no application was made to the Judge as to the indemnity, and that no directions were given by him as to such indemnity, but the Judge, when the application of the 11th of January, 1881, was made, said that he should not require any indemnity beyond the undertaking given in the order. It appears to me that that is not a compliance with the order. The frame of the order shews that the indemnity was something *ultra* the undertaking, for the order in which the undertaking is contained also contains the condition as to indemnity. The order gives leave to use the name of the company upon giving "such indemnity," not "such indemnity, if any," as the Judge shall direct, and it appears to

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me that the Judge could not decide upon the hearing of the application of the 11th of January what was the proper indemnity to be given under the former order. That could only be decided upon an application in the winding-up considered in the proper way. It seems to me that nothing said by the Judge upon the hearing of the application of the 11th of January could have any bearing upon the effect of the order of November, 1880. That order appears to me quite plain, the leave to institute the proceedings being conditional upon giving such indemnity as the Judge should direct, and this condition precedent has not been complied with. There has been therefore no leave, or rather no sufficient leave, and, consequently, there was no authority for instituting this action.

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The other question is of much greater importance, viz., whether there was any jurisdiction to give the leave. I will state the position of matters when the order of November, 1880, was made. A Mr. *Rooney* had petitioned in the winding-up to remove the liquidators. Upon that application an order was made that Mr. *Rooney's* costs should be paid to him out of the assets of the company. It is well known that such an order does not create a charge upon the assets; it limits the right of the person in whose favour it is made to payment out of the assets, but it does not create a charge upon them. If it did, the persons in whose favour such orders were made would have priority according to the dates of their orders; but that is not so. In many cases the liquidator has priority over all these orders even for subsequent costs. The order does not create a charge upon the assets, but gives a right to get paid out of the assets in a due course of administration, and nothing more, and this was a right given to the Petitioner. Messrs. *Harper & Co.* were the solicitors of the Petitioner in making that application. They of course would have a right as against their client to be paid their costs of that application, quite irrespective of the assets of the company. A personal demand could have been enforced against him, and if he had the means he could have been compelled to pay. Besides that, as between him and them, they might have a lien upon any sums coming to him under this order for payment of the costs. Beyond that, they could have no rights whatever, for they were neither creditors of the company, nor contributories, and they had no direct or even indirect charge upon the assets, though they had the means of intercepting the payment to Mr. *Rooney* of any moneys coming to him under that order, if any were to come. That being their position, they applied for leave to use the name of the company in suing the promoters and directors, with the view of increasing the assets of the company by making them liable for misfeasance. Under what doctrine can such an application be supported? It would be a difficult thing, considering the rules of law against maintenance and champerty, to suppose that a solicitor, whose client gets an order for costs in some proceedings under the winding-up, can thereupon establish a right to intervene in the affairs of the company, not merely as regards the distribution of its actual assets, but for the purpose of increasing its assets by suing the promoters and officers for misfeasance and torts, simply with the view of obtaining the payment of his costs. I cannot imagine a more shocking result of the Winding-up Acts than the establishment of any such right. Suppose that the directors were alleged to have been guilty of certain acts of misfeasance which the shareholders and creditors did not wish to have inquired into, being satisfied that no proceedings in respect of them would produce any money of which they could get the benefit, is a solicitor, merely because he has obtained through the medium of a client some trifling costs in the winding-up, to be at liberty to intervene and sue the directors, merely for the purpose of obtaining the payment of his costs and the costs of the litigation, the contributories and creditors being satisfied that nothing *ultra* costs can be obtained by the proceedings. It would be a most lamentable result of the Winding-up Acts if they authorized such an application. In my opinion no such application is authorized, and I think there was no jurisdiction to make any such order as that of the 15th of November, 1880. It is not pretended that such a jurisdiction is conferred in terms by the Act, and therefore, if the jurisdiction exists, it must exist independently of the Act. It is then said that, independently of the terms of the Act, there is a general jurisdiction to authorize contributories and creditors to institute a suit in the name of the company in a proper case. Two cases were cited in which that leave had been given, and I could add others from my own experience in winding-up matters, but then we must consider the nature of those cases. Under the old Winding-up Acts the creditors had no *locus standi*, the liquidators and the contributories were the only parties to the proceedings, and the creditors, when they had proved their debts, could not get payment in the winding-up, but were compelled to bring an action, or file a bill, as the case might be. Afterwards the creditors were admitted as parties to the proceedings, but nobody else. The only parties to the proceedings in a winding-up are the liquidators, the contributories, and the creditors. Of course applications may be made by other parties *pro interesse suo*, as in administration suits, for the purpose of removing the difficulties which the proceedings put in the way of their establishing their rights or recovering their property. But beyond that there is no person who has a right to intervene in the winding-up proceedings except the creditors and the contributories. Why should we allow the solicitor of a creditor or contributory to come in? As I have already said, it appears to me it would be very mischievous to do so. Then on what principle is it that a creditor or contributory has been allowed to sue in the name of the company? On the same principle on which a man could always have filed a bill in the old Court of Chancery against his trustee to be allowed to use his name to recover the trust property. That is the principle. Such suits were uncommon, because, as a general rule, the same relief was obtained in former days by motion or petition, and in later days by summons, in an administration suit; but that was merely the relief which could have been obtained by bill, and not a different relief; and did any one ever hear of such an application being made in an administration suit by a solicitor whose client had obtained an order for costs? I do not suppose that any such application was ever made, and I am clearly of opinion that it would not have been entertained. No jurisdiction to make such an order as that of the 15th of November, 1880, has been expressly conferred by the Act, and it appears to me that there is no sufficient reason to imply it either from the necessities of the case as regards a complete winding-up of the affairs of the company, or from the principles established in the old Court of Chancery applicable to cases relating to the assets of deceased persons, and that there is the greatest reason for not implying it on account of the mischief that would ensue. I am therefore of opinion that the order of the 15th of November, 1880, was made without jurisdiction, and was a nullity. I think that the writ and all the proceedings in the action must be set aside, and that Messrs. *Harper & Co.* must pay the costs below and here.

Cotton, L.J.:—

I agree with the Master of the Rolls as to both points, and should have added nothing to what he has said had not the principal point been one of very great importance.

Had the Court power to authorize *Harper & Co.* in this case to institute proceedings in the name of the company? There is nothing in the Act of Parliament which gives the Court such power, and *primâ facie* proceedings in the name of the company ought to be conducted by the liquidator—an officer appointed by the Court and subject to the supervision of the Court. There may be, no doubt, special cases where, although the Court does not think fit to remove the liquidator on the ground that his conduct in not bringing an action is improper, it may give power to other persons to conduct the litigation upon their giving proper indemnity against any consequences of that litigation. But who are the persons who can be authorized to take these steps? In my opinion the creditors and the contributories only, not under any special clause of the Act, but because they are the persons who, under the terms of the Act, can intervene if they are advised that the liquidator does not properly do his duty. They have a right in special cases to ask the Court for leave to do that which the liquidator is advised not to do, or which, because he has no funds, he does not do, viz., take proceedings in the name of the company, but in my opinion the power of the Court to give leave to use the name of the company stops there, and is confined to those who are parties to the liquidation. The Court has, in my opinion, no power whatever to give persons in the position of the solicitors authority to use the name of the company in any litigation against any other person. In my judgment, therefore, this order of the Vice-Chancellor was made without any jurisdiction, and the proceedings in the action must be set aside.

LUSH, L.J.:—

I am also of opinion that the order of the 15th of November, 1880, was improvidently made, and is not based upon any authority, either statutory or common law. The Companies Acts authorize no persons beside the creditors, the contributories, and the liquidator to intervene in winding-up proceedings. Messrs. *Harper & Co.* are neither creditors of the company nor contributories. They are persons who have a claim for costs against an individual whose costs have been ordered to be paid out of the assets, and it is in that capacity alone that they stand before us.

Now all that the Court did by the order of February, 1878, was to authorize the appropriation of a sufficient part of the assets which come in towards payment of Mr. *Rooney's* costs. Is there then any authority in practice or precedent for authorizing *Harper & Co.* to sue in the name of the company? Certainly I never heard of any instance in which a solicitor having a claim for costs against his client had obtained an order against the wish of his client to sue in his client's name the debtors of the client, in order to provide a fund out of which he may get paid. If the order of the 15th of November, 1880, is to be supported, I do not see why every solicitor who has a claim against a client for costs which he cannot get paid should not obtain an order to sue the client's debtors and see whether he cannot get payment in that way. That would be, to my mind, a most dangerous thing, and a much more mischievous practice than champerty and maintenance, which were so condemned at Common Law. I cannot foresee the extent of mischief and the widespread litigation that such a practice would encourage. Considering that there is nothing in the Companies Acts, and nothing that I am aware of in the practice of any Court, to sanction such an order as this, I cannot help coming to the conclusion that it is entirely without jurisdiction. The Court has no power to order a solicitor to use the name of a client against the wishes of the client in order to recover money by which he may get paid his bill of costs. I am therefore of opinion that the order was without any jurisdiction whatever, and conferred no valid authority to use the name of the company in this action.

A discussion then took place as to the costs, and *Newbiggin-by-the-Sea Gas Company* v. *Armstrong* (1) and *Nurse* v. *Durnford* (2) were referred to.

The Court held that *Harper & Co.* must pay the costs of the company as between solicitor and client, and the costs of the Defendants as between party and party.

Norton, for the official liquidator, who had been served with notice of the appeal, asked for costs as between solicitor and client.

Higgins, Q.C.:—The liquidators ought not to have costs at all, they are not parties to the action, and there was no occasion to serve them.

Jessel, M.R.:—

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The liquidators, being the persons who had a right to use the name of the company, could not be passed over, and were properly served with notice of the application and with the notice of appeal. Messrs. *Harper & Co.* must pay their costs as between party and party.

Solicitors: *Dollman & Pritchard; Norton, Rose, Norton, & Brewer; Harper, Broad, & Battcock.*

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(1) 13 Ch. D. 310.

(2) 13 Ch. D. 764.

H. C. J.

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[1877 F. 79.]

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July 5.
C. A.
1881
March 2.

[illegible]

Will—Perpetuity—Contingent Remainder—Executory Devise—Life Estate—Equitable Estate—Attaining Twenty-five—Name and Arms—Possession.

A testator devised and bequeathed real and personal estate to trustees upon trust to pay the income to his wife during her life, and after her decease, if *H.* was then living, to retain the rents of the realty to their own use during his life, and to pay him the income of the personalty during his life, and after his death upon trust to convey and transfer the real and personal estate to such son of *M.* as should first attain the age of twenty-five years, upon condition that such son of *M.* as should become entitled to any property under the will should, within two years after he should so become entitled, take the name and arms of the testator. At the testator's decease *M.* was living and had no son who had attained twenty-five, but his eldest son attained that age during the lives of the widow and *H.* This son died in the lifetime of *H.* without having taken the name and arms of the testator:—

Held, by *Malins*, V.C., that although the limitation of the personal estate to the first son of *M.* who should attain the age of twenty-five was void for remoteness, the direction to convey the real estate to him gave him a contingent remainder which was not void for remoteness, although his estate was only equitable, the doctrine of contingent remainders being applicable to equitable as well as to legal estates; that he was not bound to take the name and arms of the testator until his estate came into possession, and that the real estate devolved upon his heir.

Held, on appeal, that the limitation to such son of *M.* as should first attain the age of twenty-five years could not, as in *Riley* v. *Garnett* (1), be treated as intended to give an immediately vested interest liable to be divested on death under twenty-five, but was a limitation contingent on the son's attaining the age of twenty-five years:

Held, also, that when the legal estate in fee is vested in trustees under the instrument which creates the beneficial limitations, the feudal rule by which a contingent remainder fails if it does not vest before the determination of the particular estate does not apply, and that the limitation to such son of *M.* as should attain twenty-five years, assuming it to have been an equitable remainder, would still have been void for remoteness:

Held, also, that the direction to the trustees to convey on the death of *H.* did not create a contingent equitable remainder, but was an executory devise.

ROBERT FINCH, by will, dated the 19th of August, 1828, devised all his freehold estates to four trustees, their heirs and assigns, upon the trusts thereinafter declared concerning the same. He then devised and bequeathed all his leasehold estates as well for lives as for years to the same trustees, their heirs, executors, administrators, and assigns, respectively, upon trust to stand possessed of the said freehold and leasehold estates, and of all other his personal estate, upon trust to pay the rents, interest, and annual produce thereof to his wife during her life, and after her decease, if *Henry Mayer* should be then living, to retain to their own use the rents, issues, and profits of his freehold and leasehold estates during the life of *Henry Mayer*, and upon trust to pay the annual produce of his residuary personal estate unto the said *Henry Mayer* during his life; and from and after the decease of the said *Henry Mayer* upon trust to convey, assign, and pay his said freehold and leasehold estates, and the rents and profits thereof, and to transfer and pay the residue and remainder of his personal estate, and the interest, dividends, and annual produce thereof, unto such son of *William Macdonald*, Archdeacon of *Wilts*, as should first attain the age of twenty-five years, his heirs, executors, administrators, and assigns absolutely for ever, but upon the conditions thereinafter mentioned, and he directed that in the meantime the same should accumulate for his and their benefit. And the said testator provided that such son of the said *William Macdonald* as should become entitled to any property under that his will should, within the space of two years after he should become so entitled, take upon himself the surname of *Finch* after his own surname, and also quarter the arms of *Finch* with his own family arms, and also assume the crest of *Finch* in addition to his own family crest; and in case such son of the said *William Macdonald* who should first attain the age of twenty-five years and become entitled as aforesaid should refuse or neglect to take such surname, arms, and crest, or to take such means as might enable him so to do, and that might be necessary for that purpose as aforesaid, then his will was that after the expiration of such space of two years the estate and interest of such son so refusing should be utterly void, and should go over to the next son of the said *William Macdonald* who should attain his age of twenty-five years upon the same conditions as aforesaid, and on his not complying therewith the said freehold estates should go to his own right heirs, and his personal estate should go and belong to his next of kin.

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(1) 3 De G. & Sm. 629.

The testator died in September, 1830. Archdeacon *Macdonald* survived the testator and had several sons. *Douglas Macdonald*, the eldest, attained the age of twenty-five years in May, 1836; the testator's widow died in 1839, and *Henry Mayer* died in 1877.

The present action was brought in continuation of a suit of *Burney* v. *Macdonald* for the administration of the estate of *Robert Finch*. Inquiries were directed, and the action now came on for further consideration, the principal question being whether the devise of real estate to the first son of Archdeacon *Macdonald* who should attain the age of twenty-five years was not void for remoteness. At the time when *Burney* v. *Macdonald* (1) was decided there was no known heir of the testator. His heirs had, however, since been found.

Bristowe, Q.C., and *E. Beaumont*, for the Plaintiff.

Joshua Williams, Q.C., and *Knox*, for the heirs of *Douglas Macdonald*, who had died intestate in 1865:—

If these had been legal limitations, the devise to the eldest son who attained the age of twenty-five years would have been a contingent remainder, and therefore clearly good; and there is no difference between law and equity on this subject. In neither case are the limits of perpetuity transgressed. There is no case in which the child had attained the age of twenty-five years at the death of the tenant for life and the devise has been held bad: *Fearne*, Cont. Rem. (2); *Chapman* v. *Blissett* (3); *Hopkins* v. *Hopkins* (4); *Hopkins* v. *Hopkins* (5). In *Blagrove* v. *Hancock* (6) no child did attain the age: *Bull* v. *Pritchard* (7); *Newman* v. *Newman* (8). *Picken* v. *Matthews* (9), *Ibbetson* v. *Ibbetson* (10), *Walker* v. *Mower* (11), *Boughton* v. *James* (12), *Berry* v. *Berry* (13), are all more or less similar, and in none has the Court decided that what law would have given, equity will take away, to the disappointment of the plain intention of the testator, and so give the estate to an heir at law of whose existence the testator was not aware.

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(1) 15 Sim. 6.

(2) R. 304.

(3) Cas. t. Tal. 145.

(4) Cas. t. Tal. 44.

(5) 1 Atk. 581; West, 606.

(6) 16 Sim. 371.

(7) 1 Russ. 213; 5 Hare, 567.

(8) 10 Sim. 51.

(9) 10 Ch. D. 264.

(10) 10 Sim. 495; 5 My. & Cr. 26.

(11) 16 Beav. 365.

(12) 1 Coll. 26.

(13) 7 Ch. D. 657.

Davey, Q.C., and *Chapman Barber*, for the heirs-at-law of the testator:—

If these were all legal limitations they would be good; but here the testator has given life estates, and has given a mere direction to convey afterwards. The fact that there was a person to take makes no difference; he wants the advantage of a legal remainder. The attaining of the age of twenty-five years is not confined to the life of the tenant for life. There are few cases in which a limitation may not by possibility take effect, but that does not make the devise good, and the rule is the other way; for if by any possibility the estate may not vest within the proper time, the devise is bad: *Davidson's* Conveyancing (1). In *Bull* v. *Pritchard* (2) the limitations were not void for remoteness: *Ackers* v. *Phipps* (3); *Hale* v. *Hale* (4). In *Blagrove* v. *Hancock* (5), if the rules had been the same as to equitable estates, there would have been nothing to argue; so in *Walker* v. *Mower* (6). A legal remainder must vest *eo instanti*, but that is not the case where the testator has given the estate to trustees who are to convey; and if the equitable limitation may by possibility not vest until beyond a life in being and twenty-one years afterwards, it is void. No case was cited to shew that where the limitation is by way of trust to convey, it must vest on the determination of the life estate. The contrary was decided in *Hopkins* v. *Hopkins* (7). It is indifferent, for the purpose of the argument, what the estate is called. It may be called an executory equitable interest, but it is not a remainder, for no estate vests in the son on the determination of the particular estate: *Hayes'* Int. (8); *Jarman* on Wills (9); *Lewis* on Perpetuities (1). In *Walker* v. *Mower* (2) it was arguable whether the estate was in the child or not.

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(1) 3rd Ed. p. 338.
(2) 5 Hare, 567.
(3) 3 Cl. & F. 665.
(4) 3 Ch. D. 643.
(5) 16 Sim. 371.
(6) 16 Beav. 365.
(7) West, 606.
(8) 10th Ed. vol. i. p. 84.
(9) 3rd Ed. p. 237.

[MALINS, V.C., referred to *Doe* v. *Roach* (3).]

In *Hopkins* v. *Hopkins* (4) Lord *Hardwicke* recognised the distinction between legal and equitable estates, and held the limitations to be too remote. There is no occasion to construe this as a contingent remainder, and as an executory devise it is void. It is not a contingent remainder at all, but a direction to trustees to convey.

[MALINS, V.C.:—If at the death of the testator, *Mayer* was dead, and no son had attained the age of twenty-five years, the devise would clearly have been void.]

The proposition that nothing shall be construed an executory devise which might be construed a contingent remainder does not apply to equitable estates, and in this particular case equity does not follow the law. *Cole* v. *Sewell* (5) refers to legal remainders, but is clearly in our favour: *Sugd.* Law of Real Property (6). At law a contingent remainder can never be void for remoteness, as the estate must always be vested, but that rule does not apply where the remainder is equitable, as the estate may not be vested and the remainder may be void for remoteness.

Glasse, Q.C., *Higgins*, Q.C., *J. Pearson*, Q.C., *W. W. Karslake*, *Rigby*, *Langworthy*, *Wolstenholme*, and *Giffard*, for other parties.

Joshua Williams, in reply:—

No such case can be produced. In the cases cited the tenant for life has died before the event has occurred: *Purefoy* v. *Rogers* (7); *Carwardine* v. *Carwardine* (8). No doubt there is much confusion in the text books as to equitable remainders; and in *Bull* v. *Pritchard* (9) and *Blagrove* v. *Hancock* (10) the distinction was not attended to, but those cases would have been decided the other way if the tenant for life had been living when the event happened.

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(1) Page 424.
(2) 16 Beav. 365.
(3) 5 M. & S. 482.
(4) West, 606.
(5) 4 D. & War. 1.
(6) Page 118.
(7) 2 Saund. 380.
(8) 1 Eden, 27.
(9) 1 Russ. 213; 5 Hare, 567.
(10) 16 Sim. 371.

MALINS, V.C.:—

This case has been very elaborately argued, and the point I have to decide is certainly one of very great importance as affecting limitations of real property. I have during the argument had an opportunity of looking at the cases which were cited, and having formed a very clear opinion on the subject, I do not see that any advantage would arise from my deferring my judgment.

The limitations in this will would, according to the settled rules, be free from any difficulty if they had been legal limitations, but it is said that the rules which are applicable to legal limitations have no application where the limitations are equitable. Now I will first take the case as if the limitations were legal. [His Lordship then read the clause of the will.]

I need hardly say that if this had been a simple limitation to the first son of *William Macdonald* who should attain the age of twenty-five years, and had not been preceded by any life estate, then if *William Macdonald* had no such son at the death of the testator this would have been an executory devise, and would have been void, for such an executory devise must have been so limited as to take effect during a life in being or not later than twenty-one years after. If there is by any possibility a transgressing of the period, then the limitation is absolutely void. If, therefore, there had been no life estate preceding the limitation to the son of *William Macdonald*, and it had been a simple limitation to the first son of *William Macdonald* who should attain the age of twenty-five, and he had not a son who had attained that age when the testator died, that limitation would have been void for remoteness, as *William Macdonald* might not have had a son of that age within twenty-five years after the death of the testator. But there is the life estate to the wife, and there is the life estate to *Henry Mayer*, and then the legal fee being in the trustees, they are to convey to the first son of *William Macdonald* who shall attain the age of twenty-five years.

Now it has been conceded throughout the argument that if these had been legal limitations to the tenants for life and then to the first son of *William Macdonald* who should attain the age of twenty-five, they would have been free from all objection, because it is a rule, as laid down from the earliest period, established by Lord *Hardwicke* in *Hopkins* v. *Hopkins* (1), as old as *Purefoy* v. *Rogers* (2), before Lord *Hale*, and over and over again repeated in *Fearne's* Contingent Remainders, that you must always construe a limitation as a remainder rather than as an executory devise, if it be possible to support the devise as a remainder. With reference to the language used by Lord *St. Leonards* in *Cole* v. *Sewell* (3), which was completely adopted in the House of Lords by Lords *Cottenham* and *Brougham* (4), Lord *St. Leonards* says (5): "If there be one rule of law more sacred than another it is this, that no limitation shall be construed to be an executory or shifting use which can by possibility take effect by way of remainder. . . . As to the question of remoteness, at this time of day I was very much surprised to hear it pressed upon the Court, because it is now perfectly settled that where a limitation is to take effect as a remainder, remoteness is out of the question, for the given limitation is either a vested remainder, and then it matters not whether it ever vest in possession, because the previous estate may subsist for centuries or for all time, or it is a contingent remainder, and then, by the rule of law, unless the event upon which the contingency depends happen, so that the remainder may vest *eo instanti* the preceding limitation determines, it can never take effect at all . . . if a limitation is to take effect as a springing, shifting, or secondary use not depending on an estate tail, and if it is so limited that it may go beyond a life or lives in being, and twenty-one years and a few months, equal to gestation, then it is absolutely void; but if, on the other hand, it is a remainder, it must take effect if at all upon the determination of the preceding estate. In the latter case, the event may or may not happen before or at the instant the preceding estate is determined, and the limitation will fail or not according to that event. It may thus be prevented from taking effect, but it can never lead to remoteness." Now why is this?

(1) 1 Atk. 581; West, 606.

(2) 2 Saund. 380.

(3) 4 D. & War. 1.

(4) 2 H. L. C. 186.

(5) 4 D. & War. 27.

If the particular estate be an estate for life, the remainder must vest during the continuance of that estate, and there never can be any danger of remoteness or tying-up of property, because the very instant when the estate comes into existence the tenant for life and the remainderman can bar the entail and bar the limitations depending on the estate tail. For that reason, therefore, a remainder never can be void for remoteness.

Then, taking this as a legal limitation, it is to *Henry Mayer* for life with a contingent remainder to the first son of *William Macdonald* who should attain the age of twenty-five years. If the life estate expires before *William Macdonald* has a son who attains the age of twenty-five years the contingent remainder fails, and there is an end of the whole thing. But the event happened that *William Macdonald* had a son who attained the age of twenty-five years in the lifetime of *Henry Mayer*, and thereupon the contingent remainder became vested, the whole fee simple was disposed of, and those two men joining together could convey the fee simple if they thought fit, and there was no danger of a perpetuity. On the other hand, as I have already said, if when *Henry Mayer* died *William Macdonald's* son was less than twenty-five years of age, the contingent remainder would have failed, and the fee simple would vest in some one else.

These conclusions are not disputed so far as legal limitations are concerned, but the stress of the argument throughout has been that these doctrines have no application when the limitations are equitable. Now I confess that to me this is a doctrine entirely novel. I never heard it before, and, having heard it, I am of opinion that it is entirely unsustainable. Look at the consequences. If this were the law it would follow that if any testator, for the purpose of having a sum of money raised, or of providing for an annuity, or for any purpose of that kind, thought fit to vest the legal fee in trustees, then a series of limitations depending upon the life estate would be at once thrown overboard, and the subsequent limitations would be executory devises and not contingent remainders. Is there any authority for that? I have had the case most elaborately argued by Mr. *Davey* and by Mr. *Chapman Barber*, whose knowledge of the law relating to real property I do not think is exceeded by that of any man, and no case of that kind has been cited. On the contrary, there is the great and leading authority of Lord *Talbot* in *Hopkins* v. *Hopkins* (1) and of Lord *Hardwicke* on the same will (2). It can no longer be doubted that what is reported to have been said by Lord *Hardwicke* in *Atkyns's* Reports is erroneous, because it differs from the report in *West* which was taken from Lord *Hardwicke's* own manuscript, and that the principle applied by Lord *Talbot* in the first case, and by Lord *Hardwicke* in the second case after a change in the family had taken place, proceeds on the application of the doctrine of contingent remainders to equitable estates. All that Lord *Hardwicke* said would have been in vain—all that was done would have been in vain—if the doctrine of contingent remainders had not been equally applicable to equitable as to legal estates. Now, if we take *Hopkins* v. *Hopkins* we shall see how forcibly that is shewn. The devise was to *John Hopkins* for life, with remainder to his son *Samuel Hopkins* for life, with remainder to his sons successively in tail male. The next limitation was to the other sons of *John Hopkins* for life, with remainders in tail. Now *John Hopkins* had then only one son, *Samuel*, and he died without issue in the lifetime of the testator. The first limitation, therefore, which could take effect was to the second son of *John Hopkins*, and he had no son when the testator died, but he afterwards had a son, *William*. Then how did the devise operate? When the second devise cannot take effect on the death of the testator, but must take effect at a future period, it is an executory devise. There was in that case no particular estate, and therefore the devise to the second son was necessarily an executory devise, all the estates being equitable and treated by Lord *Talbot* and by Lord *Hardwicke* as equitable estates. What is the consequence? Is it that these doctrines of contingent remainders and of particular estates have no application to equitable estates? On the contrary, the decision is that when the second son was born he took an estate for his life, and all the remainders were contingent or vested according to the event depending on that life estate. Now, how could this have been if the doctrine of contingent remainders has no applicability to equitable estates? Why did Lord *Talbot* and Lord *Hardwicke* think that when the first executory devise for

(1) Cas. t. Tal. 44.

(2) 1 Atk. 581; West, 606.

life took effect all the limitations depending on it became contingent remainders, unless the doctrine of contingent remainders was just as applicable to equitable estates as it is to legal estates. Is there any difference in principle! What a monstrous thing it would be if a will should have one construction if it applied to legal estate, and if it happened to apply to equitable estate should have a totally different construction! Every Court ought to give effect to the testator's will if possible, and the Court is not to set aside testators' wills on arbitrary rules of law if rules can be found which will enable the Court to carry the intentions into effect. Why should the eldest son of *William Macdonald* be deprived of this estate if during the continuance of the particular estate, and without exposure to any danger of perpetuity or any other objection, he within a life in being attains the qualifications entitling him to take.

I have referred to the law as laid down by Lord *St. Leonards* in *Cole* v. *Sewell* (1). *Carwardine* v. *Carwardine* (2) is to the same effect, and the same thing will be found in *Fearne,* Cont. Rem. (3); and with regard to these doctrines the decision of Lord *Hale* in *Purefoy* v. *Rogers* (4) always has been and always must be a permanent authority.

Then the question resolves itself into this: Are these principles applicable to equitable as well as to legal limitations? Lord *Hardwicke's* judgment in *Hopkins* v. *Hopkins* (5) lays down the rule precisely in the way in which I have stated it—that the doctrine of remainders, either contingent or vested, is equally applicable to equitable estates as to legal estates. There is this great difference, that where the limitations are legal they may fail, as in *Festing* v. *Allen* (6); but where the limitations are equitable, that is if the legal fee is in the trustees, then the legal fee in the trustees preserves the contingent remainders, so far as such remainders are not open to any such objection. I take the effect of the will to be that there being an intention on the part of the testator that no son of Archdeacon *Macdonald* who does not attain the age of twenty-five years should take this estate, one may read the will to see that there is a chance of his taking the property, because he may attain that age during the lifetime of *Henry Mayer*, and if he does attain the qualification to take during the lifetime of *Mayer*, it is free from all objections. But he may not do so, and if he does not he loses his chance and the estate fails, because although the legal fee in the trustees will preserve the contingent remainder to him if it is valid, it cannot, as Lord *Hardwicke* says, preserve anything which is invalid.

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(1) 4 D. & War. 27, 28.
(2) 1 Eden, 27.
(3) Pages 393, 394.
(4) 2 Saund. 380.
(5) West, 606.
(6) 12 M. & W. 279; 5 Hare, 573.

But the stress of the argument of Mr. *Davey* as against this construction has been, that there are some cases in which this doctrine might have been applied and has not been applied. Now, on looking at them, I find that these cases are very few and very remarkable, but certainly do not interfere with or trench upon the doctrine to which I have referred. The first case to which this doctrine might have been applied if it was not, was the case of *Bull* v. *Pritchard* (1). That was a case regarding real and personal estate. It was decided by Lord *Gifford* (2) with regard to the personal estate. The limitation is to trustees for the daughter of the testator for life, with a direction to convey to her children who should attain the age of twenty-two years. Lord *Gifford* had no doubt or hesitation and could have no difficulty in deciding that case, although he abstained from deciding any more than the right to the personal estate. Twenty years afterwards the question was raised before Sir *James Wigram*, with regard to the real estate. In the meantime the case of *Festing* v. *Allen* (3) had been decided by him and affirmed by the Court of Exchequer, which held that where a gift was to one for life with remainder to the children who should attain any particular age, and the life estate expired before they attained that age, the contingent remainders failed by the expiration of the particular estate which supported them. But in *Bull* v. *Pritchard* the limitation of the real estate being to the mother for life with remainder to the children who should attain the age of twenty-three years, it was perfectly clear, on the principle I have stated, that that was a good contingent remainder, and if the children had attained the age of twenty-three years during the lifetime of the mother, just as I say

(1) 5 Hare, 567.
(2) 1 Russ. 213.
(3) 12 M. & W. 279; 5 Hare, 573.

with regard to the first son of *William Macdonald*, there was no reason why he should not take, but on the contrary there was every reason why he should. But the case did not come to be argued until after the death of the mother, and she had had one child only, which child had died at the age of eighteen. What was the consequence? If you take it as a contingent remainder it had failed, if you take it as an executory devise it was void for remoteness, and it failed also. Therefore it was not worth anybody's while to argue that it was a contingent remainder, because the argument that it was a contingent remainder would have been fatal. Therefore, all you can say of that case is, that although it might have been argued that there was a contingent remainder, it was only argued as if it had been an executory devise. The point, therefore, was overlooked by the counsel who argued the case, and by the Judge who decided it, it being perfectly unimportant, because the result must have been precisely the same.

Blagrove v. *Hancock* (1) was very much pressed upon me. It was a case before Vice-Chancellor *Shadwell*, who, like Vice-Chancellor *Wigram*, was remarkable for the accuracy and extent of his legal knowledge. There there was a gift to trustees on trust to convey to all the children of a daughter who should attain the age of twenty-five years, and it was held void for remoteness. If it had been a contingent remainder it would have failed, and if it was an executory devise it had failed; and it was not worth anybody's while to argue that it was a contingent remainder, and the point again probably was overlooked.

Other cases were cited, such as *Walker* v. *Mower* (2). There the contingency was the children attaining twenty-one, and no question of remoteness therefore could arise. All that was decided there was that the attainment of the age of twenty-one was a condition precedent to anything vesting, and, therefore, as nothing could vest until the child attained the age of twenty-one, all that Sir *John Romilly* held was that the child took nothing, and that the gift over being if there should be no child also failed, because there had been a child, although that child could not take. *Boughton* v. *James* (3) was also a mere question of personal estate;

(1) 16 Sim. 371.

(2) 16 Beav. 365.

(3) 1 Coll. 26.

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Hale v. *Hale* (1) was relied on by Mr. *Davey*, but there I find a direction to sell all the real estate, and it is the money and not the estate itself which is given, and, therefore, that is a limitation applicable to personal estate only, and has nothing whatever to do with this case.

Therefore the eminent authorities to which I have referred are in favour of the doctrine, and every principle, in my opinion, is in favour of the doctrine that limitations of real estate, whether they are legal or equitable, if they are limitations which can take effect as remainders, must be construed as remainders. This was, in my opinion, clearly a contingent remainder, which, in the event, would have taken effect if it had been a legal limitation, and equally, in my opinion, on the doctrine of the cases I have referred to, it takes effect, although it is an equitable limitation.

I am therefore of opinion that, on the eldest son of Archdeacon *Macdonald* attaining the age of twenty-five years in the lifetime of *Henry Mayer*, the fee simple of this property vested in him, subject to the preceding life estates, and that the persons claiming under him are consequently now entitled to the property.

Douglas Macdonald had never taken the name or arms of *Finch*, and

Davey, Q C., and *Chapman Barber* contended that this prevented the devise to him from taking effect. The Court has held that the estate was vested in him on his attaining the age of twenty-five years, and, therefore, he then became entitled to it, and it was clearly his property, though in reversion. He could have sold it. The usual form is "entitled in possession," and why should the word "entitled" be cut down in its meaning? In the only case on the subject, *Lady Langdale* v. *Briggs* (2), all turned upon the possession.

Malins, V.C., said that it would be very hard to hold that a man who never came into possession of property, and never had any enjoyment of it, was to lose it because he did not go to the expense of taking the name and arms of a testator. His

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(1) 3 Ch. D. 643.

(2) 8 D. M. & G. 391. 2 Jur. N.S. 983

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Lordship must hold that a man must become entitled in possession in order to be brought within the meaning of the clause.

The persons claiming under the heir-at-law of the testator appealed. The appeal was heard on the 2nd of March.

C. A.

Davey, Q.C., and *Chapman Barber*, for the Appellants:—

We say that the ulterior trusts of the will are void for remoteness, and that there is a total intestacy after the death of *Henry Mayer*. The Vice-Chancellor held this to be so as to the personalty, but supported the limitations as to the realty. We say that there is no such thing as an equitable contingent remainder where the legal fee is outstanding under the same instrument. The equitable limitation is in fact an executory limitation, for it need not vest on the expiration of the prior equitable estate. No doubt a legal contingent remainder is open to no objection on the ground of remoteness if it is limited to take effect on the determination of a particular estate, which must determine within a life or lives in being and twenty-one years, but that is because it must vest on the determination of the particular estate or else fail altogether, and that is not applicable where the fee is in trustees. It is an inaccurate expression to say that the estate of the trustees supports the contingent equitable limitations; it only supports them in this sense, that it prevents their failing if they do not vest immediately on the determination of the prior equitable interest, but that is quite a different thing from supporting them in the sense in which a prior legal estate supports legal contingent remainders. The reason why equitable contingent remainders do not fail if the contingency has not happened when the prior estate determines, is that the feudal rule that there must be a tenant to perform the services is satisfied by the estate in the trustees, and feudal rules do not apply to merely equitable interests. The opinions of text writers are in our favour as to a limitation like the present being bad for remoteness: *Jarman* on Wills (1); *Hayes*, Con. (2); *Davidson's* Precedents (3); *Lewis*

(1) 2nd Ed. 213; 3rd Ed. 237.
(2) 5th Ed. vol. i. p. 84.
(3) 3rd Ed. vol. iii. p. 338.

on Perpetuities (1). In *Hopkins* v. *Hopkins* (2), there being no second son *in esse* to take, the ulterior remainderman claimed, but his claim was disallowed, it being held that the limitation to the second son could take effect as an executory limitation. The same will came before Lord *Hardwicke* (3). Lord *Hardwicke* there said that the remote remaindermen were not protected, which, so far as it goes, is in our favour, though the precise point that is at issue here was not decided. The principle of Lord *Hardwicke's* judgment is, however, in our favour, for it excludes the idea that the estates must vest on the determination of the prior estates or not at all.

[JESSEL, M.R.:—Suppose a devise to the use of trustees in fee in trust for *A.* for life, and after his death in trust for the first son of *B.* and the first son of *C.* as joint tenants. At the death of *A. B.* has a son, but *C.* has not. Has it ever been held in Equity that the son of *B.* takes the whole, as he would do if the limitations were legal?]

Berry v. *Berry* (4) is against that contention. In *Blagrove* v. *Hancock* (5) a trust similar to the present was held void for remoteness.

[JESSEL, M.R.:—Can a direction to convey be a remainder?]

We submit that it cannot. In *Bull* v. *Pritchard* (6) a similar trust was held bad for remoteness, and no one thought of arguing that it could be supported as being a contingent remainder, and *Walker* v. *Mower* (7) is to the same effect. The rule as to remoteness as regards a class is laid down in *Pearks* v. *Moseley* (8); if the gift, as matters stood at the death of the testator, might have included objects too remote, the gift is void.

Joshua Williams, Q.C., and *Knox*, *contrà*:—

In the first place we say that this may be construed as a limitation to all the children at their birth, subject to their shares being divested if they die under twenty-five, in which case there can be no objection on the ground of remoteness. *Riley* v. *Garnett* (1) supports this view, and is mentioned without disapprobation in *Pearks* v. *Moseley* (2).

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(1) Page 425.

(2) Cas. t. Tal. 44.

(3) 1 Atk. 581; more accurately reported, West, 606.

(4) 7 Ch. D. 657.

(5) 16 Sim. 371.

(6) 5 Hare, 567.

(7) 16 Beav. 365.

(8) 5 App. Cas. 714.

[JESSEL, M.R. :—In *Riley* v. *Garnett* there was a clause empowering the trustees to grant leases after the decease of the tenant for life during the minority or minorities of her child or children. That power is unmeaning unless minors had an interest.]

In *Muskett* v. *Eaton* (3) similar words of contingency were held not to prevent vesting.

[JESSEL, M.R. :—In that case there were words shewing that the testatrix could not intend the attaining twenty-one to be part of the description of the person to take.]

Then the gift ought to be held vested by reason of the words "from and after," which import a conveyance immediately on the death of *H. Mayer*, as in *Andrew* v. *Andrew* (4).

[COTTON, L.J. :—Is there any case in which, where realty and personalty have been combined in the same gift, this violent construction by which the gift is held to be vested, liable to be divested, has been put upon the words ?]

The limitations may be construed differently as to real and personal estate, as in the cases where there has been a mixed gift of real and personal estate with a gift over if the devisee and legatee dies without leaving issue.

[JESSEL, M.R. :—Those cases are a class by themselves. Is there any modern case where, under a gift of real and personal estate to a class, different persons have been held to form the class as regards the real and personal estate ?]

Then if the limitations be treated as contingent, there is no case where a limitation which, if legal, would have been good, has been held to be invalid because the legal estate was in trustees. The cases cited do not decide the point.

[JESSEL, M.R. :—If they do not, they assume it.]

(1) 3 De G. & Sm. 629.
(2) 5 App. Cas. 714, 721.
(3) 1 Ch. D. 435.
(4) Ibid. 410.

They do not assume that if all the intended takers attained the prescribed age during the tenancy for life the gift would be invalid.

[Jessel, M.R.:—How do you make out the tenancy for life? There is no equitable tenant for life after the death of the widow. The trustees are beneficially entitled legally and equitably during the remainder of the life of *Henry Mayer.*]

Mr. *Jarman,* in support of his propositions (1), refers to *Hopkins* v. *Hopkins* and *Chapman* v. *Blisset* (2). Neither of these supports the view that equitable limitations of this kind are executory. In *Hopkins* v. *Hopkins* (3) Lord *Talbot* held that where there was no prior estate for life the limitations took effect as executory devises, but Lord *Hardwicke* held that when a set of limitations which could take effect as remainders had come in they were to be treated as contingent remainders. A remainder may be good though limited to a person too remote: *Cole* v. *Sewell* (4); *Jarman* on Wills (5). A summary of what Lord *Hardwicke* decided is given in Cas. t. *Tal.* (6) in terms which we submit express the true rule, that the fee in the trustees supports all such limitations as are within the proper limits as to remoteness.

[Jessel, M.R.:—Your difficulty is this: Apart from remoteness, all the children of Archdeacon *Macdonald* who attained twenty-five, whenever they were born, would have taken; so what becomes of the argument of the Vice-Chancellor that the gift is not bad for remoteness, because it must take effect on the determination of the life estate?]

Jessel, M.R.:—

This is an appeal from a decision of Vice-Chancellor *Malins* upon an important point of real property law. The first question is whether the rules as to remoteness apply to what has been termed an equitable remainder, where the legal estate has been vested in trustees under the same instrument which creates the equitable estate. The second question is, whether the limitation with which we have to deal in this case is an equitable remainder or an executory devise.

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(1) 3rd Ed. vol. i. p. 227.

(2) Cas. t. Tal. 150.

(3) Ibid. 44.

(4) 4 D. & War. 1.

(5) 3rd Ed. 234.

(6) Page 44.

The gifts in the will, so far as relates to the real estate, may be stated very shortly. There was a devise of freehold estate to trustees and their heirs, vesting in them the legal fee upon trust to pay the rents to the testator's wife, *Maria Finch*, for her life, then upon trust that the trustees should, during the life of one *Henry Mayer*, who was then living, retain the rents for their own use, and after his death upon trust to convey the freehold estates of the testator unto such son of *William Macdonald* as should first attain the age of twenty-five years, his heirs and assigns absolutely for ever, subject to a condition as to taking the name and arms of the testator, and in the meantime he directed that the rents should accumulate for his and their benefit.

The only facts necessary to be stated are that *William Macdonald* was living at the death of the testator, and no son of his had then attained the age of twenty-five, but he had a son who, after the testator's death but during the lifetime of *Maria Finch*, attained the age of twenty-five. *Maria Finch* and *Henry Mayer* being both dead, the question now arises whether the limitation to the son of *William Macdonald* who should first attain the age of twenty-five years is or is not void for remoteness. The Vice-Chancellor decided that it is not void for remoteness on certain technical grounds which I will proceed to consider.

Of course, if this is a limitation by way of executory devise it is void for remoteness, the rule as to remoteness being that an executory devise, in order to be valid, must be such as necessarily to take effect within a life or lives in being at the death of the testator and twenty-one years afterwards. Now it is obvious that the limitation to the first son of *William Macdonald* who attains the age of twenty-five years is not confined within the period of any life in being and twenty-one years afterwards.

The ground on which it was endeavoured to support the gift was this: it was said that the gift to the son of *William Macdonald* was an equitable contingent remainder, and that according to the law of contingent remainders the estate could not take effect at all unless it was vested at the death of the survivor of *Maria Finch* and *Henry Mayer*, and that, therefore, it could not be void for remoteness, as it must take effect at the expiration of lives in being or not at all. The argument proceeded on the footing that the same rules which govern devises of legal estates in freeholds govern also devises of equitable estates, using the term equitable in the sense I have mentioned, and the Vice-Chancellor gave effect to that argument.

The first observation to be made upon that is, that these contingent equitable remainders, as they are sometimes called, do not stand upon the same footing as legal remainders. The reason why a contingent remainder under a legal devise failed, if at the death of the previous holder of the estate of freehold there was no person who answered the description of the remainderman next to take, was the feudal rule that the freehold could never be vacant, for that there must always be a tenant to render the services to the lord, and therefore if the remainder could not take effect immediately on the determination of the prior estate, it never could take effect at all. This result of feudal rules was never held to apply to equitable estates, and it was sometimes said that the legal estate in the trustee supported the remainder. That was not the best mode of expressing the doctrine, the principle really being that as the legal estate in the trustees fulfilled all feudal necessities, there being always an estate of freehold in existing persons who could render the services to the lord, there was no reason why the limitations in remainder of the equitable interest should not take effect according to the intention of the testator. If at the time of the determination of the prior equitable estate of freehold there was no person capable of taking, a person afterwards coming into existence within the limits of the rule of remoteness, and answering the terms of the gift, was allowed to take. So that the doctrine of ascertaining once for all at the death of the tenant for life what persons were to take under the subsequent contingent limitations, had no application to equitable estates. Equity has not on this subject followed the law. According to my experience it has always been assumed, without argument, that where the fee is vested in trustees upon trust for a man for life, and after his death upon trust for such of his children as being sons shall attain twenty-one, or being daughters shall attain that age or marry under that age, and at the death of the tenant for life there are some children adult and some minors, the minors, if they live to attain twenty-one, will take along with the others; but if equity had followed the law, then, inasmuch as there were persons capable of taking at the death of the tenant for life, namely, the adult children, they would have taken to the exclusion of the children who were minors, as was the case where the limitations were legal. It appears to me, therefore, that where the legal fee is outstanding in the trustees, that doctrine of contingent remainders which, until the recent statute, prevented contingent remainders from taking effect at all unless they vested at the moment of the termination of the prior estate in freehold, has no operation, and on that ground I think this appeal should be allowed.

On the second point also I must differ from the conclusion arrived at by the learned Judge of the Court below. I cannot find that there is any equitable remainder to any child of *William Macdonald.* There is a gift to the trustees upon trust for the widow for life; then there is a direction to them to retain the rents for their own benefit during the life of *Henry Mayer*, which is not an equitable remainder, because they, having the legal ownership, cannot have a separate equitable estate. Then, on the death of *Henry Mayer*, there is a direction to them to convey the legal estate to the first son of *William Macdonald* who attains twenty-five. That direction to convey does not give the son of *William Macdonald* an equitable remainder expectant on a prior equitable life estate. There is no equitable life estate after the death of the widow, and the direction to the trustees to convey is nothing like a remainder. In my opinion, therefore, the gift to the son of *William Macdonald* is an executory limitation, and subject to all the rules with regard to executory limitations, and on this ground also I am of opinion that the decision appealed from ought to be reversed.

COTTON, L.J.:—

I am of the same opinion. One point argued by Mr. *Williams* was that the attaining twenty-five years was not part of the description of the person to take, but that the gift was to be construed as a gift to the first son, with a gift over if he did not attain

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that age, and he referred to cases in which a violent construction of that kind has been put by the Court upon devises of real estate so as to give effect to what was considered by the Court to be the intention of the testator. I asked Mr. *Williams* whether that violent construction had ever been put upon a gift which included both real and personal estate, and he was not able to refer me to any such case. But, independently of that, how can it be said that in a gift to such son of *William Macdonald* as shall first attain the age of twenty-five years, the attaining that age is not part of the original gift and part of the description of the devisee. Where that violent construction has been put upon the words there has generally been some obscurity or ambiguity in the original gift, or there has been a gift over on the person not attaining the prescribed age. In the latter case, as Vice-Chancellor *Wigram* said, in the case of *Bull* v. *Pritchard* (1), the Court construed the testator as giving all he had to the first taker, except what he had given to the devisee over. But here there is no gift over of that kind, and the attaining of the age of twenty-five is an essential part of the description of the person who is to take.

Then, assuming this is not to be a vested interest before the son attains twenty-five, is the devise bad or not for remoteness? The Vice-Chancellor, as I understand him, proceeded on this ground. He said if there is a legal contingent remainder that remainder of necessity must be vested at the ceasing of the particular estate upon which it is limited or not take effect at all, and therefore, even although it is to a person if he attains twenty-five, yet, as it must vest at or before the determination of the prior life estate, there can be no question of remoteness, for if it ever comes into effect at all it must come into effect on the expiration of a life or lives in being. That no doubt is so, but how can that apply to limitations of this kind, where the testator by his will, dealing with the legal estate and vesting it in trustees, has directed that they are to hold it in certain events and at certain times on particular trusts. The rule does not apply in equity, because in equity the feudal rules of tenure will not be allowed to defeat the trusts which the testator has declared by his will, and, even although at the termination of the particular estate the persons cannot be ascertained, yet the Court will afterwards enforce the trusts in favour of persons who subsequently come into *esse* and answer the description of the objects of gift. It follows that the objection on the ground of perpetuity is not removed.

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(1) 5 Hare, 567, 591.

I quite agree with the Master of the Rolls that the question really does not arise here, because there is no limitation by way of remainder. The estate being given by the testator to trustees, he has directed that at a particular time their estate shall be put an end to by their conveying it away to somebody else. They are not directed to hold it upon trust for somebody else during his or her life and afterwards in trust for a remainderman, but they, having the fee absolutely in themselves, are directed after a particular time to convey that estate from themselves, and to give the person then to be entitled the legal estate. Of course, if there be no objection on the ground of remoteness, equity would compel them to hold it after that particular time for the benefit of the person to whom they ought to convey, but as a matter of limitation in the will it is not a limitation of an equitable estate in remainder, it is merely a direction at a future time to convey the estate to somebody else. I am, therefore, of opinion that the question of contingent remainders really does not arise, and that the trust to arise here at a period beyond that allowed by the rules of perpetuity must be dealt with as an executory trust and not as an equitable remainder. In my opinion, therefore, the decision of the Vice-Chancellor is erroneous, and must be reversed.

LUSH, L.J.:—

I am of the same opinion. It is somewhat remarkable that there is no decision to be found expressly upon this point, but I may observe that it has been published as the opinion of very eminent text-book writers, and was assumed in *Blagrove* v. *Hancock* (1), as well by the counsel on both sides as by the learned Vice-Chancellor himself, that the doctrine as to excepting contingent remainders from the rule as to remoteness is not applicable to equitable estates. The reason appears to be a very obvious one.

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(1) 16 Sim. 371.

The doctrine in question was founded entirely upon the requirements of the feudal law which necessitated that there should always be somebody in possession as tenant of the land to render service to the lord, and therefore if the contingent estate did not take effect at the time when the preceding estate ended, then it could not take effect at all; so that remoteness was out of the question. The Courts of Equity never interfered with that doctrine, but when they came to deal with the equitable limitations of real property, where the legal fee was given to trustees by the same instrument, so that there were persons always at hand to fulfil the requirements of the feudal law, the Courts of Equity dealt with those equitable limitations according to their own principles, and, disregarding the feudal law to which there was no necessity to pay any attention as its requirements were already satisfied, they carried out the intention of the testator by giving effect to the equitable limitations according to the terms of his will. But then came in another doctrine, founded on principles of public policy, that an estate cannot be tied up longer than for a life or lives in being, and for twenty-one years afterwards.

In this particular case the testator directed that the estate should be, after the death of *Henry Mayer*, conveyed by the trustees unto such son of *William Macdonald* as should first attain the age of twenty-five years, and the rents and profits of the estate were to be accumulated until he attained the age of twenty-five years. If, therefore, the eldest son of *William Macdonald* had been born in the year in which *Henry Mayer* died, the rents and profits of the estate might have been left to accumulate, and the vesting of the estate might have been postponed beyond the period of twenty-one years from the expiration of any life in being. I am therefore of opinion that the limitation to the son of *William Macdonald* is void for remoteness.

Solicitor for the heir of *Douglas Macdonald: A. J. Murray.*

Solicitor for the heir of the testator: *W. H. Dunster.*

Solicitors for other parties: *Bockett & Son; Paterson, Snow, & Bloxam; T. H. Merriman; G. E. Philbrick.*

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March 23.

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Winding-up—Assignment by Official Liquidator of all the Property of a Company—Claims against Directors for Misfeasance—Companies Act, 1862, s. 95, *sub-s.* 3.

A company being in course of winding-up, an arrangement was entered into with the sanction of the Court, in pursuance of which the official liquidators assigned to *W.*, in the most general terms, all the estate, property, and effects of the company which the liquidators had power to dispose of, in consideration of certain payments to be made by *W.*, and which were duly made. *W.* entered into the arrangement on behalf of *E.*, an officer of the company. After this the liquidators brought forward claims against *E.* and some of the directors, alleging that they had improvidently sold property of the company at an undervalue, and seeking to make them liable for the loss, and also alleging that *E.* and some of the directors had purchased for the company certain property, and concealed the fact that it had shortly before been bought by *E.* for little more than half the amount, and seeking to make them liable for the difference. The existence of these claims was not known at the time when the above arrangement was entered into. *E.* took out a summons to restrain the liquidators from prosecuting these claims without his consent, which application was refused by *Hall*, V.C.:—

Held, on appeal, that claims of this nature were "things in action" of the company within the meaning of the *Companies Act*, 1862, sect. 95, sub-s. 3, and could be assigned by the official liquidator, that they were assigned by the deed, and that *E.* was entitled to the order which he asked, but that the order ought to be made without prejudice to any application which the liquidators might make to the Vice-Chancellor to enforce the claims, in case they should be successful in proceedings to set aside the arrangement.

THIS was an appeal from an order of Vice-Chancellor *Hall* in Chambers dismissing a summons by *Richard Kendall Evans*, which asked that the liquidators of the *Park Gate Waggon Works Company* should not, without the sanction of the Court, or except for the exclusive benefit and with the consent of the applicant, interfere or intermeddle with or take any action or proceeding relating to the assets of the company, or any of them, or any part or parts thereof.

The company was incorporated as a limited company in 1872. In October, 1877, a resolution for a voluntary winding-up was passed, and on the 9th of November, 1877, an order was made continuing the voluntary winding-up under the supervision of the Court.

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By an agreement dated the 2nd of April, 1878, made between the company of the first part, *A. Macredie* and *Joseph Bennett* the younger, the liquidators of the company, of the second part, *John Weir* of the third part, and *R. K. Evans* and *G. H. Wells* of the fourth part, the liquidators agreed to sell, and *Weir* to purchase, "All the stock-in-trade and book debts, waggons, tools, and chattels, belonging or due to the company or to the liquidators of the company, and all sums of money due or to become due in respect of the share capital of the company, or in any other manner, and all moneys of the company in the hands of the liquidators or of their bankers, and all other the assets, property, and effects of every description of the company, and which the company or the liquidators of the company have power to dispose of, subject as to all the said premises, or to such parts thereof as are affected thereby, to" [a certain specified mortgage to the *Sheffield and Hallamshire Bank*].

The purchase-money was to be a sum sufficient to pay (*a*) the liabilities and obligations of the liquidators incurred subsequently to the commencement of the winding-up; (*b*) the costs of the liquidation already incurred or thereafter to be incurred, including the costs, charges, and expenses of the liquidators, and all legal and other expenses of and incident to or connected with the liquidation of the company and the preparation and execution of the agreement and of carrying its provisions into effect; (*c*) the claims of the *Sheffield and Hallamshire Bank* and the holders for the time being of the debentures issued by the company for securing an aggregate sum of £1500; (*d*) the sum of 11s. in the pound to all the other creditors of the company who were or might, in pursuance of clause 2, become entitled to dividends from the assets or property of the company; (*e*) the liability, if any, in respect of 1000 shares in the *Sandiacre Waggon Company, Limited,* subscribed for by the company.

Clause 2 contained provisions as to admitting claims by creditors who had not yet established their debts. Clauses 3 and 4 provided for the times and mode of the payments by the purchaser. Clause 5 contained provisions as to existing contracts of the company. Clause 6 provided that the company, the liquidators, and the purchaser, should respectively, from time to time, make and execute all such assignments, assurances, or other documents, and do all such acts and things as might be necessary or convenient for giving effect to and carrying out the provisions of the agreement. By clause 7 the purchaser agreed to indemnify the liquidators against all claims by creditors or others; and by clause 8 *Evans* and *Wells* guaranteed the payment of the purchase-money. This agreement was conditional on the sanction of the Court being obtained.

By an order of Vice-Chancellor *Hall*, made at Chambers on the 16th of April, 1878, the agreement was confirmed, and the liquidators were directed to carry it into effect.

By indenture dated the 26th of August, 1878, the company and the liquidators assigned to *Weir* "All the stock-in-trade, waggons, tools, and chattels now belonging to the said company or to the liquidators of the said company, and also all the book and other debts due or owing to the said company, and all securities for the same, and the full benefit thereof and of the contracts for the hiring, leasing, or repairing of waggons entered into by the said company, and the full benefit and privilege arising therefrom, and the unpaid capital of the said company, and all sums of money due or to become due in respect of the share capital of the said company, and all moneys of the company in the hands of the said liquidators or of their bankers at the date hereof, and all other the estate, property, and effects of every description of the said company which the said company or the said liquidators have power to dispose of, and all the estate, right, title, and interest of the said company and the said liquidators in and to the said premises," to hold the premises to *Weir*, his executors, administrators, and assigns, subject to the mortgage to the *Sheffield and Hallamshire Bank*, and to the payment by the purchaser, his executors, administrators, or assigns, of all moneys to become payable by him or them under the agreement. And it was declared that, notwithstanding the execution of the assignment, clause 6 of the agreement should continue to be binding on the parties.

It appeared that shortly after the execution of the assignment all costs and moneys payable to the liquidators under it had been paid, and that the dividend of 11*s.* in the pound had been paid to the creditors, but some of the waggon hirings and waggon repairing agreements entered into by the company were still current.

On the 2nd of December, 1880, an order was made by Vice-Chancellor *Hall*, on the application of a contributory, that *Macredie* should thenceforth act as liquidator only for the purpose of getting in the unpaid capital of the company, and of receiving and paying the instalments due or to become due on waggon hiring or waggon repairing agreements still current, and of paying the moneys so to be got in and received by him to the persons to whom the same respectively should be payable, and that *James Boyes* should be appointed general liquidator in the stead of *Macredie*, to act in conjunction with *Joseph Bennett* the younger, the continuing liquidator, except for the purposes for which *Macredie* was thereby ordered to continue to act as liquidator.

R. K. Evans, who had been a managing director of the company, was the assignee from *Weir* of the property comprised in the purchase, and the arrangement had been entered into by *Weir* on behalf of *Evans*.

Boyes, after his appointment, investigated the affairs of the company, and alleged that in October, 1874, the directors purchased on behalf of the company, for £8000, from the *Sandiacre Brick Company*, some land at *Sandiacre*, which had been purchased by *Evans* in March, 1874, for £4081 5*s.*, and sold by him to the *Sandiacre Brick Company* for £8000; that the directors had been guilty of misfeasance in concealing the fact of the prior purchase for £4081 5*s.*, and were liable to the company for £3918 15*s.*, the difference between the two prices. He further alleged that in June, 1877, the directors had sold the same land, with the buildings subsequently erected on it, to a new company, called the *Sandiacre Waggon Company*, for £18,000; that this sale was improvident and at an undervalue, and that the directors were liable to the company for £13,320 18*s.* 9*d.*, the difference between that price and the value which they had put upon the property in a balance-sheet issued by them in 1877.

A meeting of shareholders having been called by the liquidators with a view to taking proceedings to make *Evans* and some

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of the directors liable in respect of the above transaction, *Evans* took out a summons to the effect stated above. This summons, on the 11th of February, 1881, was dismissed by Vice-Chancellor *Hall* in Chambers.

On the 8th of March the general liquidators took out a summons against *Evans* and two others of the directors to make them liable for the £3918 15*s.*, and a summons against *Evans* and three others of the directors to make them liable for the £13,320 18*s.* 9*d.*

Evans now appealed against the order dismissing his summons.

Robinson, Q.C., and *E. Martin*, for the appeal:—

The language of sect. 95, sub-sect. 3, of the *Companies Act*, 1862, is substantially the same as that of the *Bankruptcy Act*, 1869, which has been held to include claims of this nature: *Seear* v. *Lawson* (1). These claims therefore could be assigned, and the terms of the deed, which are as wide as possible, are clearly sufficient to include everything capable of being assigned. The Vice-Chancellor does not appear to have held that these rights were incapable of being assigned, or that the deed was insufficient to pass them, but to have proceeded on the ground that they were not within the contemplation of the parties, and that there was no intention to assign them, and that if their existence had been suggested he would have refused to sanction an arrangement which included them. That may furnish ground for setting aside the arrangement, but until it is set aside the deed must be taken as it stands.

H. Greenwood, contrà:—

The claim in *Seear* v. *Lawson* (1) was of quite a different nature from the claims in the present case. There was here nothing in the nature of a debt owing by the directors to the company. The claims are not claims for money of the company received by the directors, but are only claims for misfeasance sounding in damages, and I contend that claims of such a nature are not assignable: *In re Paris Skating Rink Company* (2); *Hill* v. *Boyle* (3).

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(1) 15 Ch. D. 426.

(2) 5 Ch. D. 959.

(3) Law Rep. 4 Eq. 260.

JESSEL, M.R.:—

The questions raised in this discussion are two. The first is whether a *chose in action* of this kind can be assigned by an official liquidator by virtue of the 95th section of the *Companies Act*, 1862, or otherwise. I think that the case is clearly within the 95th section. There is in that section no limit whatever in words upon what can be sold. It enables the liquidator "to sell the real and personal and heritable and movable property, effects, and things in action of the company, by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels." The two demands in question are certainly things in action of the company. One is said to arise in this way. It is alleged that the directors, or some of them, sold property belonging to the company at an undervalue, and the company, through their liquidator, claims the amount of the loss. That is a demand for so much money due from the directors to the company, and is an asset of the company. The other demand is very similar. It is a case in which the directors are said to have bought for the company, at the price of £8000, some property which one of them had bought a few months before for £4081 5*s.* The company claims the difference between these two sums, as being money of the company improperly expended by the directors. I have no doubt both those sums are portions of the property which the company or the liquidator could dispose of.

The second question is, were these claims disposed of by the deed? It must be remembered that the section gives power to transfer the whole of the property, effects, and things in action of the company, and to make a clean sweep of everything, and that is exactly what was done here. It appears that some of the former directors (they may have been perfectly well aware, and no doubt were aware, that questions would be raised as to their conduct) proposed to buy up the assets of the company on the terms of paying a dividend to the liquidator and the costs of the liquidation. That was the substance of the arrangement. There was some haggling, and ultimately they agreed to pay 11*s.* in the pound, having offered at first 7*s.* 6*d.*, and it was accepted. That arrangement was carried out by a formal agreement approved of by the Vice-Chancellor according to law. When they had paid

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In re PARK GATE WAGGON WORKS COMPANY.

everything, there was an assignment, also by a formal deed, by which what was sold, after specifying certain items which I need not mention, the unpaid capital of the company and all sums of money due or to become due in respect of the share capital of the company, and all moneys of the company in the hands of the liquidators or of their bankers, and all other the estate, property, assets, and effects of every description of the company which the company or the liquidators had power to dispose of, were assigned. No larger words could have been used. These demands were property or effects which the liquidators had power to dispose of, and the deed was manifestly intended to include everything that could be disposed of. In fact, the very nature of the arrangement shews it. It is quite impossible to suppose that any one would have bargained to pay all the costs of the liquidation except under the notion that the liquidation was to be at once at an end; for if it was to continue it would be bargaining to pay the costs of proceedings which might be taken against himself. It is clear that the arrangement went on the footing that the purchaser would get the whole of the assets and take the property free from all demands. I have no doubt whatever that the Appellant is entitled to all he asks, subject to this, that, if the liquidator has any case for setting aside the deed, he is entitled to have an opportunity of asserting it and of making it good if he can. Therefore we propose to make an order substantially in the terms of the summons, without prejudice to any proceedings to set aside the arrangement, and without prejudice to any application which the liquidator may make to the Judge to whose Court the liquidation is attached, in case the arrangement and the deed of assignment should be set aside. The Appellant will have the costs here and below.

JAMES and COTTON, L.JJ., concurred.

Solicitors for *Evans*: *Pilgrim & Phillips.*
Solicitor for Liquidators: *W. Bohm.*

H. C. J.

In re BARKER.

C. A.
1881
Jan. 22, 24.

Lunatic—Sale of Real Estate under the Partition Act—Conversion—Real and Personal Representatives—Partition Act, 1868 (31 & 32 *Vict. c.* 40), *s.* 8—*Settled Estates Act* (19 & 20 *Vict. c.* 120), *s.* 23.

22ChD624

By an order made in a partition suit a share of real estate belonging to a lunatic was sold, and the proceeds paid into Court to the credit of the matter of the lunacy, but they were not carried to a real estate account.

The lunatic died intestate, and his administrator claimed the money as part of the lunatic's personal estate:—

Held, that the money retained the character of real estate, and passed to the lunatic's heir-at-law.

The words of the 23rd section of the *Settled Estates Act* when imported into the 8th section of the *Partition Act* are not to be restricted to a sale of estates in settlement, but apply to all sales effected under the *Partition Act.*

The payment of the money into Court to the credit of the lunacy was not a payment "to a person becoming absolutely entitled" within the meaning of the 23rd section of the *Settled Estates Act.*

IN June, 1875, a suit was instituted for the partition or sale of certain real estates of which *Peter Jesse Barker* was seised of one undivided ninth share.

On the 28th of July, 1876, *P. J. Barker* was found by inquisition to be a person of unsound mind.

On the 10th of January, 1877, by an order made in the suit at the request of the persons entitled to a moiety of the estates, the estates were ordered to be sold, and by a further order of the 3rd of August, 1878, a sum of £3540, being the proceeds of the sale of the lunatic's share, was carried to the account in the suit of "*P. J. Barker,* a person of unsound mind."

By a subsequent order made in the cause on the 26th of April, 1879, this sum of money was carried over to the credit of the matter in lunacy generally, without stating that it represented the proceeds of real estate.

The lunatic died on the 26th of May, 1880, intestate, and a petition was now presented by his administrator asking, among other things, for payment to him of the fund representing the proceeds of the real estate mentioned in the partition suit.

The heir-at-law of the lunatic was an infant.

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Bagshawe, Q.C., and *Norton*, for the Plaintiff:—

The land was rightfully sold, and therefore all the consequences of conversion must follow, and it has never been reconverted into real estate. When conversion has been rightfully made the person who becomes absolutely entitled to the property takes it as it stands: *Steed* v. *Preece* (1).

There is nothing in the *Partition Act* to prevent the operation of this rule. The 8th section incorporates the 23rd section of the *Settled Estates Act*, and that section enacts that all money received under any sale of real estate, made under the authority of the *Settled Estates Act*, shall be paid into Court and reinvested in land to be settled to the same uses or paid to the persons becoming absolutely entitled. But that section when imported into the *Partition Act* can only refer to estates settled upon a succession of persons; it was never intended to affect the rights of the real and personal representatives of persons absolutely entitled to the property. The cases which appear unfavourable to our contention are all cases in which there was some kind of settlement, such as *In re Smith* (2); *Foster* v. *Foster* (3); *Kelland* v. *Fulford* (4); *Mildmay* v. *Quicke* (5). *Ex parte Bromfield* (6) is also distinguishable. *Wallace* v. *Greenwood* (7) is in our favour. It may be that the Court might have prevented the estate from being reconverted by carrying the money to the account of the lunatic's real estate in the lunacy or by some special declaration; but this was not done. The lunatic was a person absolutely entitled within the meaning of the 23rd section of the *Settled Estates Act*, and the payment into Court was a payment to him as such.

Byrne, for the other next of kin.

Macnaghten, Q.C., and *Edward Martin*, for the heir-at-law of the lunatic, were not called on.

JAMES, L.J.:—

I am of opinion in this case that the order ought to be made in

(1) Law Rep. 18 Eq. 192.
(2) Ibid. 10 Ch. 79.
(3) 1 Ch. D. 588.
(4) 6 Ch. D. 491.
(5) Ibid. 553.
(6) 1 Ves. 453.
(7) 16 Ch. D. 362.

favour of the heir-at-law; that is to say, we ought to treat the funds in question as real estate. There seems to me to be a broad general principle underlying all these questions, which is this, that where property is taken compulsorily from any person who is not *sui juris*, and who is not competent to make the subsequent alteration in the disposition or the devolution of that property, which would naturally follow such a change, the presumption is, if the words of the Act of Parliament really admit of that interpretation, that the Legislature did not intend to interfere with any legal rights or any legitimate expectations of any persons whatsoever. The sole object of the change, as it was in this case, is to enable the property to be disposed of advantageously, and one can conceive a great number of very unjust consequences that would follow if any other rule were to be adopted. Here the lunatic was not capable of making any alteration with regard to his property by reason of this change, and that being so, we come to the consideration of the words of the Act of Parliament with that leading principle, as it seems to me, to guide us. Here the 8th section of the *Partition Act* says in so many words that in any sale effected under the authority of that Act, the Court is to deal with the money in exactly the same way as it would be dealt with under the *Settled Estates Act*—that is to say, we must read the Act of Parliament as if all the 23rd to the 25th clauses of the *Settled Estates Act* were repeated *totidem verbis* in the *Partition Act*. That being so, we find that the words are, that the money is to be laid out in the purchase of hereditaments, to be settled in the same manner as the hereditaments in respect of which it was paid: and that means it is to be limited to the same uses, which is in fact a reconversion, unless the matter is governed by the other words, "or to a person becoming absolutely entitled." That seems to me, according to the construction put upon it under the *Lands Clauses Act*, to mean a person becoming subsequently absolutely entitled to the money. I am, therefore, of opinion in this case that the money ought to be dealt with as real estate.

The manner in which the fund was dealt with in lunacy cannot alter that right. If it was anything, it was a mere clerical slip. In all probability the point ought to have been mentioned to the Court, and the money would have been carried over and ear-marked, and dealt with as the produce of the real estate. But we never could have intended by any act of that kind to make the slightest alteration in any person's rights or expectations, and therefore we are not in any way hampered, and the parties are not in any way prejudiced, by what was done by carrying it to the general account of the lunatic. I think the proper order to be made will be for the payment of this money, the produce of the estate, to the person who would have succeeded to the estate if the property had not been interfered with.

COTTON, L.J.:—

What we have to do is to determine, on the death of the lunatic, to whom certain funds standing in Court to his credit are to be paid; and in my opinion the money which has been produced by the sale of part of his real estate—his undivided share in the property—ought to go to his heir-at-law.

The question turns on the effect of the 8th section of the *Partition Act*. The sale was made under the *Partition Act*, without any contract or consent on behalf of the lunatic so as to bind his estate under the *Lunacy Regulation Act;* and in my opinion the property remains real estate. We have to construe the 8th section, and that introduces into the *Partition Act* sect. 23 of the *Settled Estates Act*. Under the *Settled Estates Act*, the money produced by the sale of real estate, still undoubtedly remains real estate under the provisions of the section I have referred to, and it did seem to me that the only question here was whether we could give a limited interpretation to the words of the 23rd section when introduced into the *Partition Act*. In the *Settled Estates Act* they refer necessarily to settled estates, but in terms they refer to all sales of all estates without expressing that they are to be sales of settled estates, and when they are introduced into the *Partition Act*, they apply to dealings with all estates, whether settled or not settled; and in my opinion we are not justified in restricting the words of the 23rd section, when introduced into the *Partition Act*, to a sale of settled estates only, but we must fairly construe it, and apply its terms to all sales effected under the *Partition Act*. If that is so, there is a direction in the *Partition*

Act that the moneys arising from sales under that Act are either to be invested in land, or applied in paying off incumbrances on land settled to the same uses or to be paid to some person becoming absolutely entitled. I quite agree in what the Lord Justice has said as to those words to be settled in the same manner as the hereditaments. That, in my opinion, does not mean settled in the sense of limited to uses, which will not give an absolute interest to anybody, but must mean limited to the same uses as the land the sale of which produced the money. My doubt was as to the words "or the payment to any person becoming absolutely entitled." Those words point to a person who is not at the time of the sale absolutely entitled, but one who becomes entitled; and if it were necessary to give an opinion upon that, I should say it meant becoming absolutely entitled in the sense of being entitled to the money absolutely, so as to enable him to do what he pleased. But that is not the position occupied by the committee of a lunatic, and certainly not by the lunatic in a case like this.

With regard to the payment into Court in the lunacy without carrying it to a real estate account, that, in my opinion, ought not to alter the rights of the parties. The money must be dealt with without reference to the account to which it has been carried, and as if there had been no such carrying over at all. Indeed, the carrying it to a real estate account would not alter the rights at all, but simply call the attention of the Court, when the money is paid out, to the fact that a question arises about it, and that, instead of being, as apparently it is, cash, it is to be considered whether it does not still preserve the character of real estate. The title of the account is immaterial as regards the rights of the parties; and, looking at the true construction of the *Partition Act*, and of the section introduced into it from the *Settled Estates Act*, I am of opinion that this money still retains its character of land, and must go to the heir-at-law.

Solicitors for all parties: *Ridsdale, Craddock, & Ridsdale*, agents for *Nicholson, Saunders, & Co., Wath-upon-Dearne*, and for *Wood, Atkinson, & Co., Manchester*, and for *Watson & Esam, Sheffield*.

M. W.

C. A.
1881
March 7. 8.

METROPOLITAN BOARD OF WORKS *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

[1877 M. 183.]

Metropolis Management Act, 1855 (18 & 19 *Vict.* c. 120), s. 135—*Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict.* c. 102), s. 61—*Metropolitan Main Drainage—Metropolitan Area, Persons outside—Right to use Drainage—Injunction.*

22 Ch D 221, —226, 7, 230

The *Metropolis Management Act*, 1855, vested in the Plaintiffs an open sewer, called the *Stamford Brook.*

The *Metropolis Management Amendment Act*, 1862, s. 61, enacted that no person should make or branch any sewer or drain, or make any opening into any sewer vested in the Plaintiffs, without their previous consent in writing; provided that any person might, with such consent, at his own expense, make or branch any drain into any such sewer in such manner as the Plaintiff should direct. After the passing of the Act of 1855, the Plaintiffs allowed four old cottages belonging to the Defendants, on land just outside the Metropolitan area and bounded by the *Stamford Brook*, to continue to drain through an eighteen-inch brick drain into *Stamford Brook*. They subsequently, at the request of the Defendants, who paid half the cost, covered in the brook and converted it into a main sewer. When they did this, they made a drain-eye in the newly-covered-in sewer as a communication for the eighteen-inch drain.

The Defendants afterwards built other cottages on the same land, and claimed the right to use the eighteen-inch drain for the purpose of draining the new cottages through the communication into the sewer:—

Held, 1. That as the Defendants had not proved any prescriptive right to use the eighteen-inch drain for the sewage of the new cottages, nor obtained the written consent of the Plaintiffs for that purpose under sect. 61 of the Act of 1862, they were not entitled to use the eighteen-inch drain for any other purposes than those for which they used it when the brook was covered in. 2. That, therefore, the Plaintiffs were entitled to an injunction to restrain the Defendants from permitting their additional cottages, or any buildings other than the four old cottages, to drain into the *Stamford Brook.*

Semble, that if the Plaintiffs had given their written consent and fixed the size of the communication under the 61st section of the Act of 1862, the Defendants could then have used the eighteen-inch drain to the full extent of its capacity for all purposes.

THIS was an appeal from a decision of Vice-Chancellor *Hall* (1).

The facts are more fully stated in the former report, and were shortly as stated in the head-note.

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(1) 14 Ch. D. 521.

The Vice-Chancellor having granted an injunction restraining the Defendants from permitting their new cottages to drain into the *Stamford Brook*, the Defendants appealed.

Davey, Q.C., and *Speed*, for the Appellants:—

We say that, as a communication between this drain, which is vested in us, and the sewer was made with the consent of the Plaintiffs, we are entitled to use it to the extent of its capacity.

[LUSH, L.J.:—Do you say that if this sewer was a private watercourse you could drain fresh cottages into it?]

No; it would be a mere case of easement, and we should have no right to increase the burden on the servient tenement. The Act of 1855, sect. 135, vests this sewer in the board, but only as a sewer and for the purposes of a sewer, and subject to the rights of riparian proprietors. We, as riparian proprietors, could drain into it so long as we did not commit a nuisance or interfere with the rights of other riparian proprietors. Under the Act of 1862, sect. 61, to understand which sect. 77 of the Act of 1855 must be looked at, when once the board has given its consent to a communication they cannot interfere with the subsequent use of the drains which they have allowed to communicate with the sewer. The answer given is that "any person" means any owner of property within the Metropolitan area; but the Act does not say so, and we ask to have the words taken in their natural sense. The Legislature seems to have considered that the board was sufficiently protected by the power to withhold access to a communication.

W. Pearson, Q.C., and *Everitt*, for the Plaintiffs:—

In the first place the Act of 1855, sects. 5, 74, 75, 76, 77, must be looked at.

[JAMES, L.J.:—How do you confine "any person" in sect. 77 to persons mentioned in the previous sections?]

On the ground that the Act is intended to provide for draining a certain area, and was not intended to give the benefit of the drainage system to persons outside that area.

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[Lush, L.J. :—The language of sect. 76 confines it to a definite area, that of sect. 77 is not similarly confined.]

There are many sections in the Act where the words are general, and which yet cannot reasonably be construed as extending to anything outside the area, as, for instance, sect. 78. The powers of the Act are to be carried into effect by means of rates levied on the property within the area, and it is against reason that they should be applied for the benefit of persons outside the area who do not contribute to the expenses. The Act of 1862 repeals sect. 77 of the former Act, and substitutes sect. 61 of the latter Act, which is not an enabling clause, and does not give powers to any owners of property which they had not before. As against persons outside the area this is not a sewer, it is in the same position as a private watercourse: the Defendants have a prescriptive right of draining their old cottages into it, but they have no right to increase the burden. The injury to the Plaintiffs will be great if drainage from property outside the district is to be carried into our works; it is in evidence that our pumping works will be insufficient for the increased work.

[They were stopped.]

James, L.J. :—Mr. *Davey*, what prescriptive right do you allege? Have you alleged any prescriptive right at all?

Davey, Q.C. :—In terms we have not alleged any prescriptive right. No doubt when the case was launched the Defendants thought they could make out their case upon contract.

[James, L.J. :—Really there is no contract proved. There is no prescriptive right, and no application was made to the board under the statute.]

All the statute says is that the sewer or drain is to be with consent in writing.

[Lush, L.J. :—You have not obtained that.]

We have their consent, because they made the drain-eyes for the purpose of our drain, and they wrote us a letter to that effect.

[Lush, L.J. :—You have no title under the Act.]

If your Lordship thinks so, we cannot carry the case any further.

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22 ChD 23

Yate Lee watched the case for the *Willesden* Local Board.

JAMES, L.J.:—

The appeal must be dismissed with costs. On the facts it is quite clear there were no such prescriptive rights as have been alleged. If a man has an artificial drain or sewer by which he drains anything, either water or sewage, into his neighbour's land, he cannot use that drain so as to drain another close or another house. It seems to me impossible to suppose that there is anything in the English law to say that a man has the right to pour in as much sewage water as can come from anywhere, limited only by the size of the particular drain. The appeal must be dismissed with costs.

COTTON, L.J.:—

I am of the same opinion. It would have been a different question if the opening into the sewer so as to let in whatever comes to this eighteen-inch culvert had been made under sect. 61 of the Act. A very different consideration would have applied, because under that section it seems that when permission has been given for any opening to be made into the sewer of the Metropolitan Board of Works, the only limit is the size of the opening so made, or of the drain which is so introduced. But the Act is entirely out of the question, because all that was done was this: When this sewer—it is not a new sewer—was turned from an open into a covered sewer, then the Board of Works made an opening for the then existing and previously existing drain to find its way, as it had previously done, into this stream or sewer. Then one comes to consider the rights of the parties entirely independent of the Act, with one exception. Under the Act of Parliament this stream is the sewer for a certain district, that is, for the Metropolitan district. But the railway company are outside that. Therefore, as regards the railway company, they cannot allege that it is a sewer constituted by the Act for the purpose of their district. As between them and the Metropo-

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22 ChD 281

litan Board, it must be looked on as if it were no sewer at all, but simply a stream, the property of the Metropolitan Board of Works. Then comes the question, how can the railway company justify increasing the burden which their ditch throws into that stream? It is clear on the evidence that what they propose to do is to add to the burden which the stream bears in consequence of the communication. They cannot do that. There is no authority given by the Act to do it, and according to the general law they have no right to throw any burden on their neighbours unless by contract, which in this case does not exist, or by long user, that is to say, by prescription, which does not exist here. In my opinion the Plaintiffs are right, and the appeal must be dismissed.

LUSH, L.J.:—

I am entirely of the same opinion, and upon the same grounds.

Solicitors: *R. Ward*; *R. F. Roberts*; *Tilley & Soames*.

M. W.

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20 ChD 218 — 262, 263
21 ChD 328
9 QBD 656
25 ChD 126
128-9, 136, 140

THOMAS *v.* PATENT LIONITE COMPANY.

[1880 T. 909.]

Winding-up—Distraint—Commencement of Winding-up—Voluntary Winding-up—Compulsory Winding-up—Appointment of Liquidator—25 & 26 Vict. c. 89, *ss.* 87, 163—*Judicature Act*, 1875 (38 *&* 39 *Vict. c.* 77), *s.* 10.

After an extraordinary resolution for the voluntary winding-up of a company had been passed, but before a liquidator had been appointed, a landlord distrained for rent due from the company before the resolution was passed. Immediately afterwards an action was commenced on behalf of the debenture holders of the company, in whose favour the company had made a mortgage of its assets, and the company moved for and obtained in this action an order to restrain the landlords from proceeding with their distress. A receiver appointed in the action thereupon took possession of the chattels distrained, and by arrangement a sum of money was set apart to meet the claim of the landlords if the Court should hold them entitled to the benefit of their distress. Subsequently an order for the compulsory winding-up of the company was made which did not refer to the proceedings in the voluntary winding-up:—

Held, by *Malins*, V.C., that the distress was good; first, because at the time when it was made there was no liquidator to interfere; and secondly, because the voluntary winding-up was superseded by the compulsory winding-up, and ordered the rent to be paid to the landlords out of the proceeds of the chattels.

Held, on appeal, that the distress was avoided by sect. 163 of the *Companies Act*, 1862, unless sufficient grounds could be shewn for inducing the Court to exercise the discretionary power given by sect. 87, and that the circumstances of the case did not furnish any such ground, the case not being one where the landlords could not prove for rent.

The making a compulsory order for winding up a company does not avoid *ab initio* all the proceedings under a previous resolution for voluntary winding-up.

The 10th section of the *Judicature Act*, 1875, does not import into winding-up the 34th section of the *Bankruptcy Act*, 1869, which gives a landlord priority for a year's rent.

THE *Patent Lionite Manufacturing Company* were tenants of buildings in *London* under Messrs. *Tubbs & Lewis* at rents amounting to £320 a year. On the 30th of July, 1880, an extraordinary resolution was passed for a voluntary winding-up of the company, and was published in the *London Gazette* of the 3rd of August. No liquidators were appointed by the resolution. On the 5th of August *Tubbs & Lewis* put in a distress for £80 rent due on the 24th of June. On the same 5th of August the action of *Thomas* v. *Patent Lionite Company* was commenced on behalf of debenture holders in whose favour a mortgage had been made, comprising substantially the whole of the assets, and by special leave notice of motion for a receiver was given for the following day. On the 6th of August an order was made in the action appointing Mr. *Mason*, the late chairman of the company, receiver and manager. On the same day, but previous to the order appointing the receiver, the company applied in the action for an order to restrain *Tubbs & Lewis* from proceeding with their distress, and an order was made accordingly. *Tubbs & Lewis* thereupon withdrew from possession, and *Mason*, the receiver, took possession of the chattels, an arrangement being made for payment of a sum of money into a bank sufficient to meet the claims of *Tubbs & Lewis*, if the Court should decide that they were entitled to the benefit of their distress. On the 9th of August *Smith* and *Barley* were appointed liquidators under the voluntary winding-up. On the 18th of August a petition for a compulsory winding-up was presented by a creditor, and on the 8th of September a winding-up order was made which did not mention the voluntary winding-up. On the 21st of November, Mr. *Whinney* was appointed liquidator under the compulsory winding-up, and was made a Defendant to the action, which was continued by leave of the Court.

Messrs. *Tubbs & Lewis* now applied by summons that the receiver in the action should be ordered to pay them the £80 for rent.

The summons was heard before Vice-Chancellor *Malins* on the 5th of February, 1881.

Higgins, Q.C., and *A. Thomson*, for Messrs. *Tubbs & Lewis*:—

No doubt, under sect. 163 of the Act of 1862, rent due at the time when a winding-up begins cannot afterwards be recovered by distress, but here the landlord had distrained before the winding-up had really begun. For in the first place there was no liquidator under the voluntary winding-up, which was therefore ineffective, and in the next place it has been superseded and extinguished by the compulsory winding-up, which did not begin until the 18th of August: *In re United Service Company* (1). The voluntary winding-up was a mere abortion, and had no effect, as the proceedings were not adopted under sect. 146 of the Act of 1862.

J. Pearson, Q.C., and *Northmore Lawrence*, for the debenture holders, and for the liquidator under the compulsory winding-up:—

There was a good winding-up at the time, and it was not affected by the subsequent compulsory winding-up. Suppose that a voluntary winding-up had been going on for years, and calls had been made, and debts had been paid, would that be all undone by a subsequent compulsory winding-up? What has been done cannot be undone and must remain. It is absurd to say that a winding-up is nugatory, merely because a liquidator is not appointed.

Higgins, in reply:—

It is clear that on the 5th of August the landlords could not have been restrained, as there was then no liquidator, and the

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(1) Law Rep. 7 Eq. 76.

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directors could not act. There was, therefore, no one who could apply to the Court to restrain the landlords. The distress was good, and cannot be affected by anything which was done afterwards.

MALINS, V.C.:—

The question seems not to have previously arisen whether lessors, such as *Tubbs & Lewis*, can, under such circumstances, distrain for a quarter's rent.

A landlord has in general a right to distrain for rent due, but where rent has become due before a winding-up it cannot be afterwards distrained for. It is contended by the debenture holders and the liquidator that the right of distraint was lost, because a voluntary winding-up was going on. But no liquidator had been appointed under that winding-up, and therefore there was no one who could apply to the Court to restrain the landlords. It is a point of some nicety, but I do not entertain any doubt that until a liquidator was appointed nothing could be done, and the resolution to wind up had no effect. I do not say that a liquidator must be appointed on the same day as that on which the resolution is passed. Certainly not, but the consequence is that no one can carry on the business,—not the directors as the resolution supersedes them, and not the liquidator because there is none. Therefore the power of restraining creditors given by the Act could not be made use of.

I do not, however, rest my decision upon that, for on the 18th of August there was a petition for a compulsory winding-up, on which an order was made on the 8th of September, and that order does not notice or adopt the voluntary winding-up. Then when did the winding-up commence? When I look to the Act of Parliament to ascertain when in such a case as this the winding-up should be deemed to commence, I cannot find that the case of a voluntary winding-up, superseded by a compulsory order, has been in any manner provided for as regards the date at which it is to commence. Where a voluntary winding-up is continued under the supervision of the Court there, of course, the voluntary winding-up is continued as from its date; but when the voluntary winding-up is wholly superseded by a compulsory order there is

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no provision made in the Act. I must, therefore, come to the conclusion that on the 5th of August, when the distress was levied, there was no process of winding-up going on, and there was nothing at that time to prevent the landlord from distraining for his rent. The order will, therefore, be for payment to the applicants, and they must have their costs.

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An order accordingly was made as asked, that the receiver should pay to *Tubbs & Lewis* the £80 for rent, the broker's charges, and the costs of the application. The Plaintiffs and Defendants appealed. The appeal came on to be heard on the 16th of March.

J. Pearson, Q.C., and *Northmore Lawrence*, for the Appellants:—

At the time when the distress was put in the voluntary winding-up was in force, for by the *Companies Act*, 1862, s. 130, the winding-up commences from the date of the resolution. The effect of this clear enactment cannot be defeated by the fact that no liquidator had been appointed, and the Vice-Chancellor himself admits that it is not necessary that liquidators should be appointed at the time when the resolution is passed. When a resolution for winding up has been passed the property of the company must be applied in satisfaction of its liabilities *pari passu*. Then, under sect. 138, the Court could have exercised the powers given by sect. 85, and if applied to would have restrained the landlords from proceeding with their distress. This application would have been made had not the restraining order in the action made such an application unnecessary. The proceedings of the landlords would as a matter of course have been restrained in the winding-up, and as they have in fact been restrained and the distress not proceeded with, the order made in favour of the landlords cannot be sustained.

Higgins, Q.C., and *A. Thomson*, for the landlords:—

There is no clause in the Act which avoids a distress made after the commencement of a voluntary winding-up, even if there was an effectual winding-up, which we say there was not. We say that the distress was good when made, and as the compulsory winding-up did not commence till the 18th of August, that does not avoid it. If the Court had made a supervision order the proceedings under the voluntary winding-up would have remained in force, but a compulsory winding-up supersedes them: sect. 152: and they thenceforth go for nothing. Under sect. 146 there is power to adopt proceedings under the voluntary winding-up; if that is not done they become invalid. Here the winding-up order did not adopt any of the proceedings under the voluntary winding-up, and they became void.

[BRETT, L.J., referred to *Cleve* v. *Financial Corporation* (1).]

In re United Service Company (2) supports our view.

[JESSEL, M.R.:—So far as it bears on the point I think it is against you.]

Then, supposing the voluntary winding-up valid, the injunction ought not to have been granted, and we ought to be put in the same position as if it had not been granted. There is no such provision as sect. 163 with regard to voluntary winding-up, and sect. 87 only applies to compulsory winding-up. The Appellants rely on sect. 138, but there was no one who could apply under it, for only the liquidators or contributories can apply. There were no liquidators and there was no list of contributories.

[JESSEL, M.R.:—I do not agree that there were no contributories because no list had been made out.]

The Appellants rely on sect. 133, but that section requires the appointment of liquidators, and the long period which was allowed to elapse before liquidators were appointed is evidence that the voluntary winding-up was not *bonâ fide.* If the lease is taken to as an asset of the company, and used for the convenience of the winding-up, the company ought to pay the rent due at the commencement of the winding-up: *In re Lundy Granite Company* (3).

[JESSEL, M.R.:—That case only decides that where the landlord cannot prove the Court will not prevent his distraining.]

The principle laid down by Lord Justice *James* (4) goes further than that.

(1) Law Rep. 16 Eq. 363.
(2) Ibid. 7 Eq. 76.
(3) Law Rep. 6 Ch. 462.
(4) Ibid. 466.

[JESSEL, M.R.:—That principle has never been applied to cases where the landlord can prove.]

Then the *Judicature Act*, 1875, s. 10, assimilates the rules in winding-up to the rules in bankruptcy, and this imports the 34th section of the *Bankruptcy Act*, 1869, which gives the landlord priority for a year's rent. The decision in *In re Withernsea Brickworks* (1) does not conflict with this view.

JESSEL, M.R.:—

This is an appeal from Vice-Chancellor *Malins*, on which several questions have been raised which it is not necessary to decide, but several others call for our decision. The company seems to have made a mortgage in favour of its debenture holders, which included substantially the whole, if not quite the whole, of its assets. On the 30th of July, 1880, the company went into voluntary liquidation, but liquidators were not appointed. The debenture holders brought an action and obtained the appointment of a receiver. Before the receiver was appointed, but after the commencement of the winding-up, the landlords of some property held by the company put in a distress. A creditor afterwards presented a petition for the compulsory winding-up of the company, and no sale had been made under the distress before this petition was presented. On this petition an order was made for the compulsory winding-up of the company, which was insolvent. The question then is, what, under these circumstances, is to be done with a sum of money which represents the goods taken in distress? The terms of the *Companies Act*, 1862, to my mind, are clear. By sect. 163 it is enacted that "where any company is being wound up by the Court, or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents." This would clearly defeat the distress, apart from sects. 85 and 87. It has been held that under those sections the Court, notwithstanding sect. 163, has a judicial discretion to allow a landlord to distrain, and ought to do so where the landlord is not a creditor of the company and cannot prove for his rent. But, as a general rule, if he can prove, the Court will not allow him to distrain. Here it is admitted that the landlords are creditors and can prove for the rent. There is, therefore, no reason why the Court should allow them to distrain, unless the circumstances on which they rely furnish special grounds sufficient to warrant it.

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(1) 16 Ch. D. 337.

Their first argument is, that they were prevented from enforcing their distress by an injunction which was improperly obtained, and that therefore they ought to be put in the same position as if it never had been obtained. But there was no fraud in obtaining the injunction. The landlords should have applied to discharge it, and they cannot be heard to say that they are to be placed in the same position as if they had sold when they took no steps to discharge the order which restrained them from selling. The injunction, I agree, was irregular, having been made on the application of the company, not of the liquidator, for there was none—nor of a contributory. But if the landlords had applied to discharge the injunction, they would have been met by a counter-application in the name of some contributory for another injunction; so that this is a matter of form and not of substance.

It is next said that there was no voluntary winding-up in existence when the distress was made, because a liquidator had not been appointed. I think there is nothing in that point. A voluntary liquidation commences from the date of the resolution, whether a liquidator is appointed at the same time or not.

Then it is said that the compulsory winding-up puts an end to the voluntary winding-up, and so, no doubt, it does from the time when the compulsory winding-up commences, but it does not invalidate what had been done before under the voluntary winding-up.

An argument was raised on the 10th section of the *Judicature Act*, 1875. Whatever that section does, it does not give the landlord a preference. The landlord is not a secured creditor, he has a power of distress, and when he has distrained, different considerations arise; but his power of distress does not make him a secured creditor, he is a creditor who can prove for the whole of his demand, and the section does not introduce any rule that may prevail in bankruptcy as to the relative priorities of debts.

It seems to me that in the present case we must give effect to the plain words of section 163, which avoids the distress.

Brett, L.J.:—

I am of the same opinion on all points.

Cotton, L.J.:—

At the time when this summons was taken out an order for the compulsory winding-up of this company was in force, and the question is whether, under these circumstances, the application made by the summons ought to be granted. At the time when the compulsory winding-up commenced the landlords had not sold; and therefore, unless we can see a reason for acting under section 87, the order under appeal cannot be sustained.

It has been argued, and the Vice-Chancellor held, that there was no voluntary winding-up in force when the injunction was granted. But that is not so. It is true that no liquidator had been appointed, but the voluntary winding-up commenced from the date of the resolution.

Then it is said that the voluntary winding-up was put an end to by the compulsory winding-up. That argument turns on an erroneous construction of the word "superseded" in sect. 152. That expression does not mean that a subsequent order for compulsory winding-up makes the proceedings for voluntary winding-up void *ab initio,* but only that the voluntary winding-up is superseded from the commencement of the compulsory winding-up.

It was contended that the 10th section of the *Judicature Act,* 1875, imports the 34th section of the *Bankruptcy Act,* 1869, and gives the landlords a title to what they ask. We considered the effect of the 10th section in the case of *In re Withernsea Brickworks* (1), and our decision in that case covers the present. To hold that the 34th section of the *Bankruptcy Act* is thus imported would repeal the clear words of sects. 85 and 87 of the *Companies Act,* 1862, on which our decision in that case was based; and unless the words of the section are clear to that effect, we ought not to make them produce such a result. The 10th section says that the same rules shall prevail as to the respective rights of secured and unsecured creditors as may be in force under the law of bankruptcy. Now "secured and unsecured creditors" must

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(1) 16 Ch. D. 337.

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COMPANY.

mean creditors who occupy those positions at the commencement of the winding-up. The landlords were not secured creditors, and the 34th section of the *Bankruptcy Act* does not make them so. Then the section says that the same rules shall prevail as to debts and liabilities provable as in bankruptcy. It is urged that as this is a provable debt the landlords have the benefit of sect. 34. But this enactment means only that the same rules are to be in force as to proving debts—not that a creditor who under the *Bankruptcy Act* has an additional right beyond proof is to have the same right in a winding-up. I am of opinion, therefore, that the landlords are not entitled to the benefit of the 34th section, and that the appeal must be allowed.

Solicitors for Plaintiffs and Defendants: *Poole, Hughes, & Poole.*
Solicitors for Landlords: *Chapple, Welch, & Chapple.*

H. C. J.

CHATTERTON *v.* WATNEY.

[1880 C. 0388.]

C. A.
1881
March 20.

19 CLDST
573.

Judgment Creditor—Garnishee Order—Mortgagor Debtor of Judgment Debtor—Right of Holder of Garnishee Order against Mortgaged Estate—Rules of Court, 1875, *Order* XLV., *rr.* 2, 3—27 *&* 28 *Vict. c.* 112, *s.* 1.

M. mortgaged a leasehold to *W.*, and then to *B.* A judgment creditor of *B.* obtained a garnishee order against *M.* After this *W.* sold the property under a power of sale, and an action was brought to distribute the surplus proceeds:—

Held, by the Court of Appeal (affirming a decision of *Bacon*, V.C.), that the judgment creditor had no claim against the surplus proceeds of sale, for that a garnishee order has not the effect of transferring the debt due from the garnishee with the benefit of the securities for it, and that to treat the garnishee order as affecting the land before execution would conflict with the provisions of 27 & 28 Vict. c. 112.

THIS was an appeal by *R. Rogers* from a decision of Vice-Chancellor *Bacon* (1).

Horton Smith, Q.C., and *Vernon R. Smith*, for the Appellant:—

We contend that the garnishee order transfers to *Rogers* a portion of the debt due to *Budden*, with the benefit of the security for it. *Ex parte Joselyne* (1); *Ex parte Nelson* (2).

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(1) 16 Ch. D. 378.

[JESSEL, M.R.:—The Act 27 & 28 Vict. c. 112, provides that no judgment shall affect any land until delivered in execution, and it would be singular if a garnishee order has a greater effect.]

The order transfers the debt.

[JESSEL, M.R.:—But how do you make out that it gives you an interest in the land?]

It creates a security on the property of the debtor: *Emanuel* v. *Bridger* (3).

Macnaghten, Q.C., and *A. A. Terrell*, for the Plaintiff, and

Badnall, for *Ind, Coope, & Co.*, were not called upon.

JESSEL, M.R.:—

This is an appeal from a decision of Vice-Chancellor *Bacon*, that a garnishee order against a mortgagor who owed a debt on mortgage to a judgment debtor of the Appellant did not bind the surplus proceeds of the mortgaged land in the hands of a prior mortgagee. I think that the decision is right. The case turns firstly on Order XLV. of the Rules embodied in the *Judicature Act*, 1875. Rule 3 of that Order provides that "service of an order that debts due or accruing to the judgment debtor shall be attached or notice thereof to the garnishee in such manner as the Court or Judge shall direct shall bind such debts in his hands." The 4th rule empowers the Court, where the garnishee does not dispute the debt due from him, or does not appear, to issue execution to levy the amount due from the garnishee. The effect is to declare the debt bound and to make the garnishee liable to execution. At the time when the garnishee order in this case was obtained against *Margetts*, *Budden* was a mortgagee for £6000 of certain leasehold property belonging to *Margetts*, which was subject to two prior mortgages. If there were no other Act of Parliament bearing on the point, the only question would be what

(1) 8 Ch. D. 327, 330.

(2) 14 Ch. D. 41.

(3) Law Rep. 9 Q. B. 286.

the effect of binding the debt is. But the Act 27 & 28 Vict. c. 112, s. 1, enacts that no judgment shall affect any land of whatever tenure until such land shall have been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority in pursuance of such judgment. By sect. 2, the term "judgment" is to be taken to include all orders having the operation of a judgment, and "land" to include any interest in land. Therefore the order could not affect his interest in the leasehold until such interest was delivered in execution. The Appellant contends that a garnishee order is a sort of transfer of the debt and the security for it. That would defeat the provision in the 27 & 28 Vict. c. 112, by making the order affect land without any delivery in execution. This Act was passed for the purpose of facilitating the sale of land and not for the benefit of creditors. *Budden* had an interest in the land, and equitable execution could have been obtained against him, but this has not been done. Though the Appellant, as between him and *Budden*, is entitled to have the debt paid to him, he has no interest in the mortgaged premises. He has no title, and the appeal must be dismissed.

Brett, L.J.:—

I am of the same opinion. The argument of the Appellant went on the ground that by the garnishee order the debt is transferred, and he referred to the language of Lord Justice *James* in *Ex parte Joselyne* (1) as supporting this view. But the *Judicature Act* contains no words importing a transfer of the debt, and I think that the Lord Justice when he said that the property in the debt was transferred was only using a colloquial expression which meant nothing more than that the debt was bound. I am of opinion that the Appellant's case fails.

Cotton, L.J.:—

I am of the same opinion, and should be content to rest the case on Order xlv. alone. If that gives the judgment creditor no interest in the land, it is unnecessary to consider the other Act of Parliament referred to by the Master of the Rolls, though that Act strongly supports the conclusion at which we have arrived.

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(1) 8 Ch. D. 327.

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The effect of a garnishee order is to bind the debt attached and to prevent the creditor from receiving it; and when it is made absolute it gives the judgment creditor a right to recover payment from the garnishee, and by rule 8 it is provided that payment made by the garnishee under the proceeding shall be a valid discharge to him as against the judgment debtor. There is nothing in the terms of the General Order to affect any security for the debt, it only takes away the right of the judgment debtor to receive the money and gives the judgment creditor a right to receive it. It has not the effect of transferring the security, nor does it give the person who obtained the garnishee order any right to the security or any claim against the land comprised in it.

JESSEL, M.R.:—

I quite agree with the view of the Lord Justice *Cotton*, that a garnishee order does not operate as a transfer of the debt.

Solicitors: *H. W. Chatterton; H. Tyrrell; Peacock & Goddard; Gellatly, Son, & Warton; Pownall, Son, Cross, & Knott.*

H. C. J.

C. A.
1881
April 4.

In re PARKER.
BENTHAM *v.* WILSON.

[1880 P. 104.]

Will—Construction—"Second Cousins."

19 Ch. D. 202-4

A testator gave one-third of his property to his first cousins and two-thirds to his second cousins. At his death he left first cousins, second cousins, and children and grandchildren of first cousins:—

Held (affirming the decision of the Master of the Rolls), that the term "second cousins" did not include children or grandchildren of first cousins.

THIS was an appeal by two cousins once removed and a first cousin twice removed of the testator, from a decision of *Jessel*, M.R. (1).

Chitty, Q.C., and *Byrne*, for the Appellants:—

We contend that according to the authorities "second cousins" will include all cousins more remote than first cousins and not more remote than second cousins: *Slade* v. *Fooks* (1); *Mayott* v. *Mayott* (2); *Silcox* v. *Bell* (3); *Charge* v. *Goodyer* (4); *Corporation of Bridgnorth* v. *Collins* (5); *Sanderson* v. *Bayley* (6); *Stoddart* v. *Nelson* (7); *In re Blower's Trusts* (8). There is evidence that the testator was in the habit of calling the children of his first cousins second cousins, and this is according to ordinary practice.

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(1) 15 Ch. D. 528.

[THE COURT expressed a doubt whether such evidence was admissible.]

Such evidence was admitted in *Grant* v. *Grant* (9). The decision of the Master of the Rolls excludes nearer relations to benefit more remote ones. His Lordship treats *Mayott* v. *Mayott*, *Silcox* v. *Bell*, and *Charge* v. *Goodyer*, as laying down no principle; but Lord *Cottenham*, in *Sanderson* v. *Bayley* (10), treats them as laying down the principle for which we contend.

[COTTON, L.J.:—Is there any case that helps you where the gift has been to second cousins only, and not to first and second cousins together?]

Bagshawe, Q.C., and *Wiglesworth*, for second cousins, were not called upon.

JAMES, L.J.:—

I am of opinion that the decision of the Master of the Rolls must be affirmed. His Lordship's observations on *Mayott* v. *Mayott* appear to me to be well founded, and I agree that it does not decide the point stated in the head-note. In *Silcox* v. *Bell* the will mentions representatives of first or second cousins, and the word "representatives" might properly be taken in the sense in which it is used in the *Statute of Distributions*. The observation of Lord *Cottenham* in *Sanderson* v. *Bayley* (11), as to the principle of *Mayott* v. *Mayott*, *Silcox* v. *Bell*, and *Charge* v.

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(1) 9 Sim. 386.
(2) 2 Bro. C. C. 125.
(3) 1 S. & S. 301.
(4) 3 Russ. 140.
(5) 15 Sim. 538, 541.
(6) 4 My. & Cr. 56.
(7) 6 D. M. & G. 68.
(8) Law Rep. 6 Ch. 351.
(9) Ibid. 5 C. P. 380, 727.
(10) 4 My. & Cr. 56, 61.
(11) 4 My. & Cr. 56, 81.

Goodyer (1), does not extend to a case like this, nor affirm any such principle as is contended for. His Lordship was only shewing that even if those decisions were right they did not affect the case before him. Those were cases of gifts to first and second cousins. In the present case there are two distinct gifts not united in any way—one to first cousins and the other to second cousins. We do not intend to shake the old cases, but we do not consider them applicable to the present.

BRETT, L.J.:—

I am of the same opinion. When words are used which, according to the general understanding of mankind, have a plain and definite meaning, they ought not, unless there be a controlling context, to be taken in any other meaning. I agree with the Master of the Rolls in thinking that the words "second cousins" have a plain and definite meaning, and also in thinking that the old cases referred to do not lay down any general principle which can control that meaning. If any such principle was laid down as is suggested by Lord *Cottenham* in *Sanderson* v. *Bayley* (2), it does not apply to a gift like the present.

COTTON, L.J.:—

If the authorities had laid down any general rule of construction applicable to the present case, I should be slow to depart from it; but we must not assume that the construction to be put upon a word when occurring in one form of gift is to be applied to it when occurring in another form of gift. Lord *Cottenham*, in commenting upon the cases of *Mayott* v. *Mayott* (3), *Silcox* v. *Bell* (4), and *Charge* v. *Goodyer*, says (5): "In all those cases the gift was to all the testator's first and second cousins, and in all first cousins once removed were held to be entitled, but not because they were first cousins, but because they were within the degree of second cousins." His Lordship does not say whether he approves of those cases or not, it being unnecessary for the purpose of his decision to say whether they were right or wrong, but he refers to

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(1) 3 Russ. 140.

(2) 4 My. & Cr. 56.

(3) 2 Bro. C. C. 125.

(4) 1 S. & S. 301.

(5) 4 My. & Cr. 61.

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them as turning upon the gift being a gift to a class of first and second cousins. Here there is no such gift to a mixed class—there is a gift to first cousins and a separate gift to second cousins. Those cases, therefore, do not apply. The *Corporation of Bridgnorth* v. *Collins* (1) is a direct authority against the claim of first cousins once removed to take under a gift to second cousins. I agree with the Master of the Rolls that the old cases do not lay down any general rule. *Mayott* v. *Mayott* (2) appears to have turned on the particular wording of the will. In *Silcox* v. *Bell* (3) the only question was whether the Master had found correctly according to the terms of the decree. In *Charge* v. *Goodyer* (4) nothing was decided but that a gift to first and second cousins was not restricted by an express direction that certain specified persons who were first cousins twice removed should be let in to participate.

As regards the evidence that the testator was accustomed to call his first cousins once removed second cousins, it is enough to say that as the parties have come here on a special case, evidence is not admissible. I do not, however, encourage the idea that such evidence would under any circumstances be admissible. The case of *Grant* v. *Grant* (5) went on the ground that the words of the will were as applicable to one party as to the other, so that there was a latent ambiguity. Whether that case be correct or not, I am of opinion that there is no such latent ambiguity here.

Solicitors: *Ridsdale, Craddock, & Ridsdale.*

(1) 15 Sim. 538.
(2) 2 Bro. C. C. 125.
(3) 1 S. & S. 301.
(4) 3 Russ. 140.
(5) Law Rep. 5 C. P. 380, 727.

H. C. J.

Goodman's Trusts, In re (1881) 17 Ch. D. 266
Followed. *In re* BISCHOFFSHEIM.
CASSEL *v.* GRANT [1948] 1 Ch. 79

C. A.

1881

Feb. 28;
March 4;
April 13.

In re GOODMAN'S TRUSTS.

Statute of Distributions—22 & 23 Car. 2, c. 10, ss. 6, 7—Next of Kin—Brother's Child—Intestate domiciled in England—Child legitimated by Subsequent Marriage—Foreign Law.

21 Ch D 102, 3
24 Ch D 637, 8
641

The *Statute of Distributions* being a statute not for Englishmen only but for all persons, English or not, dying intestate and domiciled in *England*, and applying universally to persons of all countries, races, and religions whatsoever, the proper law for determining the "kindred" under that statute is the international law adopted by the comity of states.

Therefore a child born before wedlock, of parents who were at her birth domiciled in *Holland*, but legitimated according to the law of *Holland* by the subsequent marriage of her parents:—

Held (by *James* and *Cotton*, L.JJ., *dissentiente Lush*, L.J.), entitled to a share in the personal estate of an intestate dying domiciled in *England* as one of her next of kin, under the *Statute of Distributions.*

Boyes v. *Bedale* (1) disapproved.

The decision of *Jessel*, M.R., reversed.

THIS was an appeal by *Hannah Pieret* from a decision of *Jessel*, M.R. (2), disallowing her claim as one of the next of kin of *Rachel Goodman.*

Rachel Goodman died unmarried in 1878, domiciled in *England*, and a legacy given by her will having lapsed to her next of kin, was paid into Court under the *Trustee Relief Act*, and the question for decision was who were her next of kin at the time of her death.

It appeared that her sole next of kin were the children of her two deceased brothers. One of these brothers, *Leyon Goodman*, had three illegitimate children in *England* by *Charlotte Smith*, and in 1870 went to *Holland* with the intention of permanently residing there. While in *Amsterdam* he had another illegitimate child by *Charlotte Smith*, *Hannah Pieret*, the present Appellant. In 1822, while still in *Amsterdam*, he married *Charlotte Smith*, and thereby the previously born children became legitimate according to the law of *Holland*. They afterwards had another child, *Anne Denis*, who claimed to be the only legitimate child according to the English law. The Master of the Rolls decided that *Hannah*

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(1) 1 H. & M. 798. 10 Jur NS 977

(2) 14 Ch. D. 619.

Pieret was illegitimate according to English law, and she appealed from this decision.

The facts are more fully stated in the previous report.

Davey, Q.C., and *Speed*, for the Appellant:—

The persons who are to take under the statute must be the children, the sons and daughters, of the intestate's two brothers. The question whether the Appellant is a daughter of *Leyon Goodman* or not is one of *status* to be determined by the law of domicil of the father: *Story*, Conflict of Laws (1); *Huberus*, De Con. Leg. (2); *Vinnius*, Ad. inst. (3); *Burge* on Foreign and Colonial Law (4).

She has already been declared to be a legitimate child in *Goodman* v. *Goodman* (5), a suit relating to her grandfather's estate, and the reason why the three children born in *England* were excluded was that the father was on their respective births domiciled in *England*.

In the case of *Doe* v. *Vardill* (6), the son, being an *ante natus*, was held not entitled to inherit real estate in *England;* but in that case Lord *Brougham*, with the apparent consent of all the Lords, assumes as an incontrovertible proposition that as regards personal estate he could succeed; the decisions of the Barons as declared in the *Statute of Merton* only affected the law of inheritance, and the inference may be drawn from the demand of the Bishops being confined to that, that as regards succession to personal estate, the canon law then prevailed.

The case of *Boyes* v. *Bedale* (7) is no doubt against the Appellant; but the observation of Vice-Chancellor *Wood* on the effect of the statute is only a *dictum*. The decision was that a child born before marriage and subsequently legitimated by a marriage in *France* was not included in the term "children" in the will of a testator domiciled in *England*, on the principle that the will is to be construed and effect given to it according to the English law, the law of the domicil. That is so, no doubt, but that does not affect the question here, who is the "child," for it is part of the law of *England* that the *status* of the child is to be determined by the law of the domicil of the father. The Vice-Chancellor, we submit, was right in his principle, but wrong in his application of it to the facts.

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(1) 93, b.

(2) Lib. i. tit. 3, § 9.

(3) Lib. i. tit. 3, Introd.

(4) Vol. i. pp. 59–97.

(5) 3 Giff. 643. 8 Jur NS 554

(6) 2 Cl. & F. 571; 7 Cl. & F. 895; 6 Bing. N. C. 385; 9 Bl. N. R. 32.

(7) 1 H. & M. 798, 805. 10 Jur NS. 199

In *Re Wright's Trusts* (1), at the time of the birth of the claimant the father was domiciled in *England*, which is the case of the three children of *Leyon Goodman* who were excluded.

In *Udny* v. *Udny* (2) Lord *Hatherley* describes the former decisions in *Boyes* v. *Bedale* (3) and *Re Wright's Trusts* as holding that by English law a bastard child whose putative father was English at its birth could not be legitimated by the father afterwards acquiring a foreign domicil and marrying the mother in a country where subsequent marriage legitimates issue.

Re Don's Estate (4) was the converse of *Doe* v. *Vardill* (5), viz., that a father could not inherit English land as heir of an *ante natus* son; but Vice-Chancellor *Kindersley* there states the principle to be such as we are contending for, viz., that the legitimacy or illegitimacy of any individual is to be determined by the law of that country which is the country of his origin, that if he is legitimated by the law of that country his personal *status* here is that of a legitimate son.

The judgment of Lord *Wensleydale* in *Fenton* v. *Livingstone* (6) is in our favour; he says that the distribution of personal estate is governed by the law of the domicil. So too is *Skottowe* v. *Young* (7), a case under the Legacy Duty Acts, where the Vice-Chancellor held persons in exactly the same situation as Mrs. *Pieret* to be "children" and liable to pay duty at 1 per cent. only.

[They also referred to *Wallace* v. *Attorney-General* (8); *Munro* v. *Saunders* (9); *Shedden* v. *Patrick* (10); *Strathmore Peerage Case* (11); *Rose* v. *Ross* (12); *Munro* v. *Munro* (13); *Shaw* v. *Gould* (14); *In re Wilson's Trusts* (15).]

If the Master of the Rolls is right, children legitimate by the law of *Australia*, *e.g.*, children of the marriage of a man with a

(1) 2 K. & J. 595. 2 Jur N.S. 465
(2) Law Rep. 1 H. L., Sc. 441, 447.
(3) 1 H. & M. 798, 805.
(4) 4 Drew. 194. 3 Jur N S 1192
(5) 2 Cl. & F. 571; 7 Cl. & F. 895; 6 Bing. N. C. 385; 9 Bl. N. R. 32.
(6) 3 Macq. 497, 547.
(7) Law Rep. 11 Eq. 474.
(8) Law Rep. 1 Ch. 1.
(9) 6 Bli. 468.
(10) 1 Macq. 535.
(11) 4 Wils. & Shaw, App. 89.
(12) 4 Wils. & Shaw, 289.
(13) 7 Cl. & F. 842.
(14) Law Rep. 3 H. L. 55.
(15) Ibid. 1 Eq. 247.

(3) S.C. 10 Jur N.S. 196.

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deceased wife's sister, if they came to settle in *England* and become domiciled here, would be bastardized.

The law of *England* does adopt the general rules of jurisprudence recognised by foreign countries, provided they are not *contra bonos mores.*

D. L. Alexander, for the Petitioners:—

An English statute must be construed according to the interpretation put upon words by the English law. Here the nearest of kindred are the "children" of the intestate's brothers: sect. 7. We are thus thrown back on the meaning of the word "children," and that by English law means "children born in wedlock." A will is construed according to the law of the domicil of the testator, and the ascertainment of the persons who are to take under such will is also to be made under the same law: *Story*, Conflict of Laws (1).

Boyes v. *Bedale* (2) is in my favour; if that case is right, its reasoning will *à fortiori* apply here.

It is really stronger in the case of an intestacy than in that of a will, for there may be a question whether there may not be a sufficient *descriptio personæ* as to shew that by "child" the testator meant an illegitimate child.

The succession to personalty is governed by the law of the domicil, not of the claimant, but of the deceased intestate—in this case an English domicil: *Doglione* v. *Crispin* (3), and the observations of Lord *Westbury* in *Enohin* v. *Wylie* (4).

Under the statute no one can come in who is not born in lawful wedlock. A constructive legitimacy, by a notion of relation back, is not such as will entitle a person to claim.

Bleby, and *Brabant*, for other parties.

Davey, in reply.

April 13. LUSH, L.J.:—

This case raises a question of great importance, namely,

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(1) 479, a, 479, c.

(2) 1 H. & M. 798. 16 Jur NS 196

(3) Law Rep. 1 H. L. 301.

(4) 10 H. ~~&~~ C. 1, 13. 8 Jur NS 597/

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whether, in the administration of the goods of an intestate English subject domiciled in *England*, a child of the intestate's brother, born illegitimate in *Holland*, but legitimated in that country by the after-marriage of the father and mother, both being at the time of the birth and marriage domiciled in *Holland*, is entitled to claim as one of the next of kin under the *Statute of Distributions*. The contention on the part of the Appellant is that her *status* in *Holland* as a legitimated child of the brother of the intestate entitles her as "brother's child" within the meaning of that statute, thus raising the question whether the statute is to be interpreted with reference to the civil law or to the common law.

It was admitted, and, as far as my researches have enabled me to form an opinion, rightly admitted, by the counsel on both sides that no decision is to be found in our books which sanctions such a construction of the Act. It is well established that the distribution of an intestate's property is governed by the law of his domicil. If the father of the claimant, being domiciled in *Holland* and dying intestate, had left personal property in this country, our Courts would have administered it, not under the *Statute of Distributions*, but according to the law of *Holland*, and in that administration the claimant would have been treated as one of his lawful children. To that extent, and with reference to that course of administration, it might truly have been said that her *status* in her own country was recognised and accepted as her *status* here. But we are dealing with the estate of an intestate who was domiciled in *England*, and in such a case the administration is to be according to English law. This is admitted on all sides; but then it is argued for the Appellant that English law, even when it has to deal with an English estate, has so far yielded to the comity of nations as to accept the *status* established by the law of the claimant's domicil, and, departing from its own table of consanguinity, to treat as of kin a person who if born in this country would have been *filius nullius*. This is the point upon which I have the misfortune to differ from my learned colleagues.

The only authority for this doctrine is to be found in the opinions of foreign jurists, and in some *dicta* of our own Judges based upon those opinions. It will be remembered that in the well-known case of *Doe* v. *Vardill*, which I shall presently have to discuss more fully, Lord *Brougham* warmly advocated this doctrine in the House of Lords, and with perfect consistency sought to carry it to its full extent as applicable to the succession to land where, as in that case, the alleged heir was a British subject; but the House declined to adopt his views, and decided that a Scotchman legitimated in *Scotland* by the subsequent marriage of his parents, could not take as heir to his father in *England*, because he was not born in lawful wedlock. I cannot help remarking, in passing, that this point being established, a decision in favour of the present claimant would now present the singular anomaly pointed out by Lord *Brougham*, that the same person may be both legitimate and illegitimate in the same country; legitimate as regards succession to personalty, illegitimate as regards succession to real estate. In the Appellant's own country no such anomaly exists. She is legitimated there for all purposes. But if she died seised of real estate in this country intestate and childless, that estate would undoubtedly go to the Crown, but her personalty, if she succeeds in her present claim, would go to those who by the law of *Holland* are her kindred.

I believe I may say with perfect accuracy that no trace of such an inroad upon the ancient common law of *England* is to be found in any digest or treatise of English law, nor in any *dicta* of Judges until comparatively modern times. That it was part of the ancient law of *England* that a person born out of lawful wedlock was deemed *filius nullius* cannot be disputed. And as such a person had no kindred in the ascending line it follows that he had no collateral relations. The oft-quoted *Statute of Merton* shews that the clergy of that day sought to introduce the canon law, which, like the civil law, recognised the subsequent marriage of the parents as legitimating the previous issue, but that the Barons stoutly resisted it. To understand the early part of this statute it must be remembered that general bastardy where it was put directly in issue, whether in a real or in a personal action (1), was tried by the certificate of the Ordinary; the validity of the marriage being supposed to be within the exclusive cognizance of the Church (*Com.* Dig. Bastardy, D. 2); but special bastardy, as it was called, of which the question put in the King's writ mentioned in the statute is an instance, was tried by the country, that is, by the rules of the common law (1); and general bastardy when not put directly in issue, was also tried by the country. This explains the answer of the Bishops to the King's writ. The *Statute of Merton* is in these terms: "To the King's Writ of bastardy, whether one being born before matrimony may inherit in like manner as he that is born after matrimony, all the Bishops answered that they would not, nor could not answer to it because it was directly against the common order of the church, and all the Bishops instanted the Lords that they would consent that all such as were born afore matrimony should be legitimate as well as they that be born after matrimony as to the succession of inheritance, for as much as the church accepteth such for legitimate. And all the Earls and Barons with one voice answered that they would not change the laws of the realm which hitherto had been used and approved."

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(1) 2 Roll. Abr. 865.

It was argued that this decision of the Barons affected only the law of inheritance, and that it may be inferred from the demand of the Bishops being confined to that branch of our law, that the canon law already prevailed in the succession to personalty, and some of the reasoning in *Doe* v. *Vardill* undoubtedly favours this view. But this appears to me to be pure speculation, and when the subject is considered in all its bearings, it will be seen that there is no foundation for it. It is easy to conceive why at that day prominence should be given to real estate, and that the Bishops might well conclude that if the canon law were introduced into the law of inheritance, it would be let in without hesitation to the succession to personalty. The church had no more jurisdiction to certify the question proposed in the writ in a personal than in a real action. It was always tried by the country. It was true that the Ordinary had at that time the disposal of the goods of an intestate, and after paying the widow and children their *partes rationabiles* they might apply the surplus as they pleased, free from the control of the temporal Courts (2). How they disposed of the

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(1) 2 Roll. Abr. 865.

(2) 2 Bl. Com. 494; 1 Williams, Executors, pt. i. bk. v. p. 402.

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surplus is immaterial to the present question. If the common law had recognised any distinction at that time between the succession to real and the succession to personal estate, it would have been a strong argument for the Bishops, and something one would expect would have been said about it. The *Statute of Merton* has been the subject of further consideration since *Doe* v. *Vardill* was decided. Even Lord *Brougham*, who so strenuously opposed that decision, said in the later case of *Fenton* v. *Livingstone* (1): "*Doe* v. *Vardill*, in some of the opinions of the learned Judges below, is supposed to have been decided in consequence of a statutory provision, but the *Statute of Merton* is only declaratory of the common law—or rather it is a refusal to alter that law." Lord *Wensleydale* expressed himself to the same effect, and Lord *Hatherley*, when Vice-Chancellor *Wood*, in his judgment in *Re Wright's Trusts* (2), says: "Ever since the discussion that took place in *Doe* v. *Vardill* it has been acknowledged by all parties, and by Lord *Brougham* himself, who was opposed to the view of the Judges, that the *Statute of Merton*, though it is confined to the inheritance of lands, is nevertheless to be taken as a declaratory Act of the common law as it then existed. That is strongly verified by the presumption which arises from the contemporaneous change in the form of the writ directed to the bishop which used to be open, but which from fear of the bishop's attachment to the law of the church has been altered, and instead of sending an open writ to him to inquire as to bastardy, they always send to inquire whether the child was born in wedlock." I have already shewn that when bastardy was put directly in issue the writ went to the bishop to certify as well in a personal as in a real action.

I therefore read the *Statute of Merton* as declaring that no innovation upon the ancient law of *England* of the nature of that demanded by the Bishops shall be made at all. Not that the civil law was unknown to or unnoticed by the temporal Courts. In 1 *Roll.* Abr. tit. Bastardy D., it is said, quoting 47 Edw. 3, 14. b, 11 Hen. 4, 84, *Bracton*, book v. pp. 416, 417: "If *A.* has issue by *B.*, and afterwards they intermarry, still the issue is bastard by our law, but *mulier* by the civil law" (*mulier* being the designation of one born of a wife).

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(1) 3 Macq. 497, 532.

(2) 25 L. J. (Ch.) 621, 627; S. C. 2 K. & J. 595. 2 Jur NS 465

There is here no suggestion of any distinction between succession to real and succession to personal estate. *Blackstone* thus deals with the question, who are bastards (1): "A bastard by our laws is one that is not only begotten but born out of lawful matrimony. The civil and canon laws do not allow a child to remain a bastard, if the parents afterwards intermarry; and herein they differ most materially from our law, which though not so strict as to require that the child shall be begotten, yet it makes it an indispensable condition, to make it legitimate, that it shall be born after lawful wedlock. And the reason of our English law is surely much superior to that of the Roman if we consider the principal end and design of establishing the contract of marriage, taken in a civil light, abstractedly from any religious view which has nothing to do with the legitimacy or illegitimacy of the children. The main end and design of marriage being therefore to ascertain and fix upon some certain person to whom the care, the protection, the maintenance, and the education of the children should belong, this end is undoubtedly better answered by legitimating all issue born after wedlock than by legitimating all issue of the same parties even born before wedlock so as wedlock afterwards ensues, 1. Because of the very great uncertainty there will generally be in the proof that the issue was generally begotten by the same man, whereas by confining the proof to the birth and not to the begetting, our law has rendered it perfectly certain what child is legitimate and who is to take care of the child. 2. Because by the Roman Law a child may be continued a bastard or made legitimate at the option of the father and mother by a marriage *ex post facto*, thereby opening a door to many frauds and partialities which by our law are prevented. 3. Because by those laws a man may remain a bastard till forty years of age, and then become legitimate by the subsequent marriage of his parents whereby the main end of marriage, the protection of infants, is totally frustrated. 4. Because this rule of the Roman Law admits of no limitations as to the time or number of bastards so to be legitimated, but a dozen of them may twenty years after their birth by

(1) Book i. p. 455.

the subsequent marriage of their parents be admitted to all the privileges of legitimate children. This is plainly a great discouragement to the matrimonial state, to which one main inducement is usually not only the desire of having children, but also the desire of procreating lawful heirs, whereas our constitutions guard against this indecency, and at the same time give sufficient allowance to the frailties of human nature. For if a child be begotten while the parents are single, and they will endeavour to make an early reparation for the offence by marrying within a few months after, our law is so indulgent as not to bastardize the child if it be born, though not begotten, in lawful wedlock, for this is an incident that can happen but once, since all future children will be begotten as well as born within the rules of honour and civil society. Upon reasons like these we may suppose the peers to have acted at the Parliament of *Merton* when they refused to enact that children born before marriage should be esteemed legitimate. From what has been said it appears that all children born before matrimony are bastards by our law."

In another chapter, book ii. c. 15, on "The rights of things," he states one instance in which our law shews indulgence to persons born out of lawful wedlock, but whose parents afterwards intermarry. He says, "There is indeed one instance in which our law has shewn them some little regard, and that is usually termed the case of *bastard eignè* and *mulier puisnè*. This happens when a man has a bastard son and afterwards marries the mother and by her has a legitimate son, who, in the language of the law, is called a *mulier*, or as *Glanvil* expresses it in his Latin, *filius mulieratus*, the woman before marriage being *concubina* and afterwards *mulier*. Now here the eldest son is bastard, or *bastard eignè*, and the younger son is legitimate, or *mulier puisnè*. If then the father dies, and the *bastard eignè* enters upon his lands and enjoys it to his death and dies seised thereof whereby the inheritance descends to his issue, in this case the *mulier puisnè* and all other heirs (though minors, *femes coverts*, and under any incapacity whatever) are totally barred of their right. And this, 1. As a punishment on the *mulier* for his negligence in not entering during the bastard's life and evicting him. 2. Because the law will not suffer a man to be bastardized after his death, who entered as heir and died seised and so passed for legitimate in his lifetime. 3. Because the canon law (following the civil) did allow such *bastard eignè* to be legitimate on the subsequent marriage of his mother, and therefore the laws of *England* (though they would not admit either the civil or canon law to rule the inheritance of this kingdom yet) paid such regard to a person thus peculiarly circumstanced that after the land had descended to his issue they would not unravel the matter again and suffer his estate to be shaken. But this indulgence was shewn to no other kind of bastard, for if the mother was never married to the father such bastard could have no colourable title at all." These extracts, written nearly a century after the passing of the *Statute of Distributions*, shew that the learned commentator was not aware of any concession to the canon and civil law which should entitle a legitimated *ante natus* to rank in our table of consanguinity as a child born in wedlock. If he had, surely he would in one or other of these paassges have mentioned it.

The Ordinary continued to have the disposal of the goods of an intestate until the 31 Edw. 3, st. 1, c. 11. That Act required him to depute "the next and most faithful friends" of the intestate to administer his goods, that is, said *Coke*, "the next of blood who are not attainted of treason, felony, or other lawful disability, but are lawful friends": *Hensloe's Case* (1). This is the original of administrator: *Williams* on Executors (2). The 21 Hen. 8, c. 5, s. 3, is founded upon the authorities cited by *Coke*. It enlarges in some degree the power of the ecclesiastical Judge by providing that in case any person dies intestate, or that the executors named in any testament refuse to prove it, the Ordinary shall grant administration to "the widow of the deceased, or to the next of his kin, or to both as by the discretion of the same Ordinary shall be thought good." And the section goes on to say, that "where divers persons claim the administration as next of kin, which be equal in degree of kindred to the testator or person deceased, and where any person only desireth the administration as next of kin where indeed divers persons be in equality of kindred as is aforesaid, that in every such case the Ordinary to be at his election and liberty to accept any one or more making request where divers do require the administration."

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(1) 9 Rep. 39, b.

(2) Vol. i. pt. i. bk. v. p. 403.

The "next of kin" mentioned in this statute are the "next of kin" mentioned in the *Statute of Distributions*. Any person filling that relation so as to be entitled to share in the distribution, is entitled in his order, subject to the discretion of the Ordinary given by the Act of Hen. 8, to take out administration. I have been unable to find an instance in which administration to an English estate has been granted, or even applied for, to a child born out of wedlock but domiciled and legitimated in a foreign country.

Of the *Statute of Distributions* the late Mr. Justice *Williams* says: "It is obvious to observe how near a resemblance this statute bears to the ancient English law *de rationabili parte bonorum.*

"It also bears some resemblance to the Roman Law of Succession *ab intestato*, which, and because the Act was also penned by an eminent civilian (Sir *Walter Walker*) has occasioned a notion that the Parliament of *England* copied it from the Roman Prætor, though it is little more than a restoration, with some refinements and regulations, of our old constitutional law, which prevailed as an established right and custom from the time of King *Canute* downwards, many centuries before *Justinian's* laws were known or heard of in the western parts of *Europe*" (1); and *Holt*, C.J., laid it down in *Blackborough* v. *Davies* (2), in reference to this statute, that if the Spiritual Court attempted a distribution contrary to the rules of the Common Law, they would prohibit, "for by that statute," said he, "they are restrained to the rules allowed among us."

I now come to the *dicta* of Judges which are supposed to sanction the doctrine contended for by the applicant, namely, that English law recognises for the purposes of succession to the personal estate of an intestate domiciled in *England* the *status* of legitimacy which the applicant has acquired in his or her foreign domicil. The first in order and importance is *Doe* v. *Vardill* (3).

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(1) Wms. Exrs. 8th Ed. p. 1493.

(2) 1 P. Wms. 49, 50.

(3) First reported in 5 B. & C. 438.

The facts were that *W.*, domiciled in *England*, died intestate, leaving one brother who was domiciled in *Scotland*, and who, after having had an illegitimate son, married the mother of the child, who thereby became by the law of *Scotland* legitimated. The Plaintiff was that son, and he claimed to inherit the lands in *England* as heir to *W.*

Tindal, who afterwards became Lord Chief Justice of the Common Pleas, contended for the Plaintiff that legitimacy was a personal *status* which accompanied the man wherever he went, and after citing *Huber*, "*De Conflictu Legum*," and other writers on international law, in support of the proposition, said it must be conceded that the rules laid down by these writers could only apply where our laws admit the existence of a corresponding *status*, and where they are not at variance with any positive law, and instanced the *status* of slavery as one "which was not recognised in this country." After quoting *Dalrymple* v. *Dalrymple* (1) that the validity of a foreign marriage must be tried by the law of the country where it was celebrated, and the *status* thereby acquired is recognised in every other country, he says: "in like manner in cases of intestacy the foreign law prevailing at the place of the intestate's domicil, has governed the distribution of property in this country. The argument for the Plaintiff only extends to the recognition of the *status* of marriage and of legitimacy which are known to the whole of *Europe* where Christianity is professed. We do recognise the foreign marriage, why not the consequences also?" The counsel on the other side pressed on the Court that this country does not recognise any foreign *status* where it is contrary to the spirit of our moral, religious, and political opinions.

I have set out the substance of the arguments in order to explain passages in the judgment which are ambiguous, and which I venture to think have been misunderstood. *Abbott*, C.J., said (2): "The rule as to the law of domicil has never been extended to real property, nor have I found in the decisions in *Westminster Hall* any *dictum* giving countenance to the idea that it ought to be so extended. Two decisions in the House of Lords have, however, been referred to, whence it is said such an opinion may be inferred: it is therefore satisfactory to me to know that

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(1) 2 Hagg. Const. 58.

(2) 5 B. & C. 451.

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this case may be carried before that tribunal. There being no authority for saying that the right of inheritance follows the domicil of the parties, I think it must follow that of the country where the land lies. Personal property has no locality, and even with respect to that, it is not correct to say that the law of *England* gives way to the law of a foreign country, but that it is part of the law of *England* that personal property should be distributed according to the *jus domicilii*. . . . . It is not against our law that a foreign marriage, however solemnized, should be held good. We adopt the laws of all Christian countries as to marriage, but it by no means follows that we are to adopt all the consequences of such marriages which are recognised in foreign countries; it is sufficient if we admit all such consequences as follow from a lawful marriage solemnized in this country."

The single paragraph that "it is part of the law of *England* that personal property should be distributed according to the *jus domicilii*," forms the basis of the Appellant's argument. But to my mind it is obvious, looking to the argument and the well-established rules of distribution, that the domicil referred to is not that of the person who claims to participate in the distribution, but the domicil of the intestate whose property is under administration.

The property of an intestate domiciled in a foreign country, as I before observed, is and always has been distributed according to the foreign law, and if the property in question had belonged to a person domiciled in *Holland*, the Appellant would undoubtedly have been entitled. But the property of an intestate domiciled in *England* is and always has been distributed according to English law. The concluding sentence of the judgment expresses the view of the Lord Chief Justice as to the law of *England*, and limits its recognition of the consequences of marriage to such "as follow from a lawful marriage solemnized in *England*."

Bayley, J., says (1): "I concede that the *lex loci* governs the question of marriage; but whether all the consequences recognised in a foreign country as following upon a marriage there, are also to be recognised in this country, is a very different question, and I think must be answered in the negative." *Holroyd* and *Little-*

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(1) 5 B. & C. 453.

dale, JJ., expressed themselves to the same effect. Though the judgment is confined to the point in question, namely, the right of succession to real estate, the observations quoted in answer to the arguments shew conclusively to my mind that neither of these Judges would, under the circumstances of this case, have sanctioned the Appellant's claim.

The two cases in the House of Lords quoted in the argument and referred to by the Lord Chief Justice, are *Shedden* v. *Patrick* (1) and the *Strathmore Peerage Case* (2). *Shedden* v. *Patrick* was an appeal from the Court of Session. *Shedden*, of *New York*, entered into a regular marriage there with a woman who had previously borne him two children. He died there intestate, leaving an estate in *Ayrshire*. The marriage had not the effect in *America* of rendering the children legitimate. It was held that the son could not inherit the estate in *Scotland*, because his legitimacy or illegitimacy must be determined according to the laws of *America*, where his parents were domiciled and where he was born, and by the laws of that country he was illegitimate. It was argued in *Doe* v. *Vardill*, and perhaps rightly argued, that if the claim in *Shedden* v. *Patrick* had been founded upon circumstances similar to those upon which the case then in question depended, the claim would have been established by the House of Lords. For the House was sitting to administer the law of *Scotland*, and if the civil law had prevailed in *America* as it prevails in *Scotland*, the claimant might have been held legitimate by the law of *Scotland* and entitled to inherit. The *Strathmore Peerage* case was decided on the same principle.

It cannot, I should think, be doubted that a person legitimated by a subsequent marriage would, in any country where the canon or civil law prevails, be recognised as legitimate; but we are dealing with English law, which has never, that I can find, adopted this rule of the canon or civil law, but on the contrary, has persistently repudiated it and steadily abided by the Common Law of *England*.

The next reported stage of *Doe* v. *Vardill* is in 2 Clark & F. p. 571; 9 Bligh's New Reps. p. 32. The question had been argued before the Judges, and their opinion was delivered by

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(1) 1 Macq. Sc. 535.

(2) 4 Wils. & Shaw, App. 89.

Chief Baron *Alexander*. It is clear that the opinion of foreign jurists had influenced the learned Judges, and they drew a distinction between what is there called "real and personal *status*," the last being that which respects the person and follows it everywhere, the first that which is connected with the land and adherent to it, and is as immovable as the subject to which it is applied.

They intended this doctrine, I have no doubt, to be applied as well to the administration of the goods of an intestate domiciled in *England* as to those of an intestate domiciled abroad. The inaccurate quotation from Lord *Stowell's* judgment in *Dalrymple* v. *Dalrymple* given by Chief Baron Alexander shews how strongly they had been prepossessed in favour of this distinction.

Dalrymple v. *Dalrymple* (1) was a suit by an alleged wife for restitution of conjugal rights, and the only question before the Court, and the only question touched on by the judgment, was the validity of a Scotch marriage. After recapitulating the facts, Lord *Stowell* (then Sir *William Scott*) says (2): "Being entertained in an English Court the cause must be adjudicated according to the principles of English law applicable to such a case. But the only principle applicable to such a case by the law of *England* is that the validity of Miss *Gordon's* marriage rights must be tried by reference to the law of the country where if they exist at all they had their origin. Having furnished this principle, the law of *England* withdraws altogether and leaves the legal question to the exclusive judgment of the law of *Scotland*." Not a word is said from the beginning to the end of a long and elaborate judgment, devoted to the effect of the evidence on the single question of marriage or no marriage, as to the *status* of the children here or in *Scotland*, for no such question could possibly arise in the case. Yet Chief Baron *Alexander* quotes it as if it dealt with the *status* of ante-born children. He says at the commencement of the judgment, after stating that the first question in order regarded the *status* or condition of the then claimant, "I believe I express the opinions of the Judges when I say in the well-considered language of Lord *Stowell* in *Dalrymple* v. *Dalrymple*, 'The cause being entertained in an English Court must be adjudicated according to the principles of English law applicable to such a case; but the only principle applicable to such a case by the law of *England* is that the *status* or condition of the claimant must be tried by reference to the law of the country where the *status* originated. Having furnished this principle, the law of *England* withdraws altogether and leaves the question of *status* in the case put to the law of *Scotland*.' Such is the sentiment of that great Judge, and such is his language, varied only so far as to apply to a question of legitimacy what was said of a question respecting the validity of a marriage."

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(1) 2 Hagg. Const. 54.

(2) 2 Hagg. Const. 58.

Thus the preliminary question in the cause leading up to the point which the Court had to determine was, notwithstanding what had been said by the Judges in the Court below, without reasoning or discussion quietly assumed. Dr. *Story*, I may here observe, adopts the version of *Dalrymple* v. *Dalrymple* (1) given by Chief Baron *Alexander*, and starting from that broadly lays it down that the *status* of legitimacy or illegitimacy decided by the law of the place where the marriage took place must be deemed equally true and valid everywhere else, quoting *Doe* v. *Vardill* from 9 *Bligh* (2). The Judges nevertheless, resting on the *Statute of Merton*, were of opinion that this doctrine was not applicable to immovable property, and advised the House that the claimant not being born in wedlock could not inherit as heir.

Lord *Brougham* strongly opposed both the distinction between movable and immovable property which the Judges had drawn and their conclusion, and advocated the adoption of the civil law as regards succession in both cases. He pointed out with great force the anomalies and inconveniences which would result from such a distinction (3). "That a man may be bastard in one country and legitimate in another, seems of itself a strong position to affirm; but more staggering is it when it is followed up by this other, that in one and the same country he is to be regarded as bastard when he comes into one Court to claim an estate in land, and legitimate when he resorts to another to obtain personal succession; nay, that the same Court of Equity, when the real estate happens to be impressed with a trust, must view him as both

(1) 2 Hagg. Const. 54.

(2) Story's Conflict of Laws, 93, e.

(3) 2 Cl. & F. 595.

bastard and legitimate in respect of a succession to the same intestate. Further still, should he happen to be next of kin to his uncle, who had a mortgage upon the estate, he must be denied his succession to the land of the mortgagor in his quality of bastard, and be allowed to come in as an incumbrancer upon the self-same estate in his capacity of legitimate son to the same mortgagor. All this is assumed to be the law by the learned Judges who have decided below and advised your Lordships here." And further on he says (1): "May I be permitted most respectfully to express a doubt whether or not this question has received all due consideration at the hands of those learned Judges, and whether they have not dealt with it a little too easily; made somewhat too light of it." The learned Lord deeming the decision wrong, thought it desirable that the case should undergo further consideration.

Lord *Lyndhurst* expressed himself as struck with some of the views put by Lord *Brougham*, and thought they required very full and patient consideration, and Lord *Denman* concurring, the case was ordered to be further argued before the Judges. In 1840 (2) the case was argued before *Tindal* (then C.J.), *Vaughan*, *Bosanquet*, *Patteson*, *Williams*, *Coleridge*, *Coltman*, JJ., and *Parke*, *Maule*, and *Gurney*, BB., and the unanimous opinion of the Judges delivered by *Tindal*, C.J. One cannot but observe a marked difference between this opinion and that delivered by *Alexander*, C.B.

The opinions of foreign jurists were as before insisted on by counsel, but, instead of taking for granted the proposition that the *status* of the claimant as regards succession to chattels must be tried by reference to the law of the country where the *status* originated, *Tindal*, C.J. (3), left that question untouched.

"There can be no doubt," he said, "but that marriage, which is a personal contract, when entered into according to the rites of the country where the parties are domiciled, and the marriage celebrated, would be considered and treated as a perfect and complete marriage throughout the whole of Christendom. But it

(1) 2 Cl. & F. 596.

(2) Reported 7 Cl. & F. 895.

(3) 7 Cl. & F. 935, 937.

does not therefore follow that, with the adoption of the marriage contract, the foreign law adopts also all the conclusions and consequences which hold good in the country where the marriage was celebrated." . . . . "But admitting, for the sake of argument, and we are not called upon to give our opinion on that point, that *B.* legitimate in *Scotland* is to be taken to be legitimate all over the world; the question still recurs whether, for the purpose of constituting an heir to land in *England*, something more is not necessary to be proved on his part than such legitimacy; and if we are right in the grounds on which we have rested the first point, one other step is necessary, namely, to prove that he was born after an actual marriage between his parents." No doubt this was said with reference to the succession to real estate, the point in question in the cause. But what I desire to call attention to, is that the ultimate opinion of the Judges gives no sanction to the Appellant's claim, but leaves that question open. Lord *Brougham* adhered to his former opinion, though he did not oppose the judgment being affirmed. The case therefore stands as a binding authority, that for the purpose of succession to real estate, the foreign *status* of legitimacy by the subsequent marriage of the parents is not recognised by the law of *England*. It remains to be decided, so far as this case or any other case up to 1840, the date of this judgment, is concerned, whether the solecism already pointed out shall be introduced into our law, or whether the succession to personal estate, always supposing it to be the estate of an intestate domiciled in *England*, shall follow the succession to realty.

I come now to the case of legacy duty, upon which great stress was laid by the counsel for the Appellant: *Skottowe* v. *Young* (1). An Englishman by birth, but domiciled in *France*, was possessed of considerable estate in *England*. He married in *France* a French lady, by whom he had previously had two daughters, and they were legitimated according to French law, and placed upon the same footing as children born in wedlock. By his will he devised his real estate to trustees upon trust for sale and conversion, giving a share in the proceeds to each of his two legitimated

(1) Law Rep. 11 Eq. 474; 40 L. J. (Ch.) 366.

daughters, whom he described in the will as his daughters. The question argued was at what rate legacy duty was to be paid upon these legacies. The Commissioners of Inland Revenue claimed 10 per cent., on the ground that these daughters were illegitimate and "strangers in blood," within the meaning of 55 Geo. 3, c. 184. The petition prayed for a declaration that the legacy duty was only 1 per cent., treating them as children of the testator. Vice-Chancellor *Stuart* in giving judgment referred to *Doe* v. *Vardill* as a case in which it was admitted that the claimant then held in *England* the *status* of a legitimate son, except for the purpose of inheriting real estate, and treated these legatees, therefore, as entitled to rank as children, and in that character liable to a duty of only 1 per cent.

The Vice-Chancellor's estimate of the effect of *Doe* v. *Vardill* is, I venture to say, certainly erroneous. Very different was Lord *Cranworth's* view as expressed by him in *Shaw* v. *Gould* (1). "The opinions of the Judges in that case, and of the noble Lords who spoke in the House, left untouched the question of legitimacy except so far as it was connected with succession to real estate. I think they inclined to the opinion that for purposes other than succession to real estate, for purposes unaffected by the *Statute of Merton*, the law of the domicil would decide the question of *status*. No such decision was come to, for no question arose except in relation to heirship to real estate. But the opinions given in the case seem to me to shew a strong bias towards the doctrine that the question of *status* must, for all purposes unaffected by the feudal law as adopted and acted on in this country, be decided by the law of the domicil." This is all that can be said of *Doe* v. *Vardill*, so far as it bears upon the question now under discussion, and more than can be said of the opinions of the Judges in the second argument. Vice-Chancellor *Kindersley* took what I venture to call the same erroneous view of *Doe* v. *Vardill* in his judgment in *Re Don's Estate* (2), as Vice-Chancellor *Stuart* took.

But this is not the only part of the judgment of Vice-Chancellor *Stuart* which is unsatisfactory. It had been established twenty-six years before by the House of Lords in the case of *Thompson* v.

(1) Law Rep. 3 H. L. 70.

(2) 4 Drew. 194. 3 Jur NS 1192

Advocate-General (1), as a general principle of law applicable to all such cases, that personal property in *England* follows the law of the domicil of the testator or intestate, and that it is precisely the same as if the personal property had been in the foreign domicil at the time of his death. Further, that the Act imposing legacy duties was limited to *Great Britain,* and that notwithstanding the general terms contained in the schedule, those terms must be read in connection with the 1st section of the Act, and must receive that limited construction and interpretation which is alone consistent with the 1st section. Upon these principles it was decided that where a British-born subject died domiciled in *Demerara* possessed of personal property in *Scotland,* probate being taken out there for the purpose of administering, and legacies paid to legatees residing in *Scotland,* such legacies were not liable to legacy duty. In a subsequent case, *Arnold* v. *Arnold* (2), Lord Chancellor *Cottenham,* referring to *Thompson* v. *Advocate-General,* said that independently of that authority he should, upon the construction of 36 Geo. 3, c. 52, s. 2, have been of opinion that the legacies in question were not legacies given by the will of a person intended by the Act, for that "when the Act speaks of 'any will of any person' and of the legacies being payable out of the personal estate, it must be considered as speaking of persons and wills and personal estates in this country; that being the limit of the sphere of the enactment." After the passing of the *Succession Duty Act* (16 & 17 Vict. c. 51) an attempt was made to charge such legacies with succession duty. This also failed, and upon the same grounds: *Wallace* v. *Attorney-General* (3). This decision, which was by Lord Chancellor *Cranworth,* was given five years before the case of *Skottowe* v. *Young* (4) was argued, yet neither of the three cases was noticed either in the argument or judgment.

If any distinction could be drawn between a legacy bequeathed out of the proceeds of land directed to be sold (which is in terms chargeable with legacy duty under the Act) and any other legacy on the ground that at the date of the testator's death it was real estate, it would have been satisfactory to know that that point

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(1) 12 Cl. & F. 1.

(2) 2 My. & Cr. 256.

(3) Law Rep. 1 Ch. 1.

(4) Law Rep. 11 Eq. 474; 40 L. J. (Ch.) 366.

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was taken and dealt with, but it was not. The legacies were treated throughout as payable out of personalty. "The trust for conversion," said the Vice-Chancellor, "is valid, and the subject of the gift is therefore personal estate."

If legacy duty had been payable in this case the decision would have been quite right. For the Court was administering a foreign, not an English estate, and as by the foreign law the petitioners took as children of the testator, they could not be charged in any other character. One other case supposed to be favourable to the Appellant remains to be noticed; it is *Fenton* v. *Livingstone* (1). Lord *Wensleydale's* judgment is quoted as supporting the Appellant's claim. I read it in an entirely opposite sense. The question in the cause related to the succession to real estate in *Scotland*, and to that only. The claimant was the issue of an incestuous marriage in *England*, which was solemnized before the passing of Lord *Lyndhurst's* Act, and in the Scotch Court he was held entitled to succeed as heir, because, the mother being dead, the marriage not having been questioned in the lifetime of the parties, must be taken as a valid marriage. The Lords reversed this decision. In giving judgment Lord *Wensleydale* said (2): "It must be considered as established that the law of a man's domicil regulates his rights to a personal property wherever situated on the acknowledged principle of *mobilia sequuntur personam*, and therefore the succession to his effects takes place according to the law of the place where he is domiciled at the time of his death in the cases of intestacy or testacy. It is now fully and perfectly settled by our law, that the law of the domicile regulates the distribution of personal estate in the former case, and the form of the will in the latter. The law of the domicil also regulates the personal qualities which take effect from birth, such as legitimacy or illegitimacy, absolutely as to the succession of personal property, but subject to a qualification as to realty. The laws of the state affecting the personal *status* of its subjects travel with them wherever they go, and attach to them in whatever country they are resident."

It must be admitted that there is some obscurity in the first and last of these passages. But read with the intermediate passages they appear to me clearly to mean that his rights "as to the disposition of his personal property are regulated by the law of the domicil, and therefore the succession to his effects takes place according to the law of the place where he is domiciled," not where the claimant is domiciled. So in the next sentence, "The law of the domicil" (that is, the same domicil first spoken of—the domicil of the owner of the property) "regulates also the personal qualities which take effect from birth, such as legitimacy or illegitimacy, absolutely as to the succession to personal property, but subject to a qualification as to realty."

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(1) 3 Macq. 497.

(2) 3 Macq. 497, 547.

The argument is, a person who is legitimate in *England* but not legitimate in *Scotland* is entitled in the administration of personal property which happens to be in *Scotland* of an intestate domiciled in *England* just as he would be if the estate were administered in *England*, but it is not so as regards real property in *Scotland*. The succession to that is governed by the law of *Scotland*. On this ground the case was said to bear a close resemblance to *Doe* v. *Vardill*.

I now come to the authorities on the other side. In *Re Wright's Trust* (1) Vice-Chancellor *Wood* held that a child born in *France* of a French mother by an Englishman who had not then become domiciled in *France*, could not become legitimated in the view of English law by anything that afterwards occurred in *France*, and could not therefore take under an English will as "child" of her father.

Udny v. *Udny* (2) is to the same effect. I mention *Re Wright's Trust* because it was cited in the argument, and referred to and distinguished by the Vice-Chancellor in the case which is precisely in point, namely, *Boyes* v. *Bedale* (3).

An Englishman residing in *England* bequeathed a sum of £5000 upon trust after the death of his nephew, to whom he gave the dividends for life, to divide the principal amongst the children of his nephew attaining the age of twenty-one years, or if only one such child, then to that only child.

The only child the nephew had was one born in *France* of a French mother long after the death of the testator, but after the nephew had acquired a French domicil. Some years after the

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(1) 2 K. & J. 592; 25 L. J. (Ch.) 621. (2) Law Rep. 1 H. L., Sc. 442.
(3) 1 H. & M. 798; 33 L. J. (Ch.) 283. 10 Jur NS 19

(1) S.C. 2 Jur NS 465

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child's birth the parents intermarried, and then the child became legitimated by the French law.

The question was whether such child could take under the bequest. After taking time to consider, the learned Vice-Chancellor delivered a long and elaborate judgment (which is fully reported in the *Law Journal*) reviewing the authorities, and especially quoting from *Story's* Conflict of Laws, and holding it to be clear that the daughter could not, in an English Court administering the trusts of an English will, be recognised as a "child." He adopts the rule laid down by *Story* (1), that "where the will is made in the place of the domicil of the testator the general rule of the Common Law is, that it is to be construed according to the law of the place of his domicil in which it is made. A will therefore made of personal estate in *England* is to be construed according to the meaning of the terms used by the law of *England*, and this rule equally applies whether the judicial inquiry as to its meaning and interpretation arises in *England* or any other country." "It appears to me," said the Vice-Chancellor (2), "there is such an abundance of authorities as to the construction of all testators' wills with reference to their domicil, that I really have no doubt upon the subject. The testator's will, and every term in it, must be construed according to the law of the testator's domicil, unless there is something to the contrary apparent on the face of the will." He adds: "So if you take a case under the *Statute of Distributions* I apprehend the law would be the same. I apprehend it to be quite clear that if a man died domiciled in *England* descendants of this description not legitimate *ab initio*, but legitimated in another country, would never under the statute take a part in the distribution of the property." In *In re Wilson's Trusts* (3), affirmed *sub nom. Shaw* v. *Gould* (4), Vice-Chancellor *Kindersley* followed with approval the rule expressed by Vice-Chancellor *Wood*, that "the word 'children' in an English will must be construed to mean children lawfully begotten, unless an intention appears in the will to use the term in a different manner."

It is argued, and with truth, that the reference of Vice-Chan-

(1) Sect. 479, a.

(2) 33 L. J. (Ch.) 284.

(3) Law Rep. 1 Eq. 247.

(4) Ibid. 3 H. L. 55.

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cellor *Wood* to the *Statute of Distributions* was an *obiter dictum.* But does it not follow as a logical sequence from the decision?

If a testator uses the very words of the *Statute of Distributions* and bequeaths legacies to his "brother's children" or his "next of kindred in equal degree," and nothing appears to shew that he intended to use the words in any other than their legal sense, a legitimated child, such as the applicant is, would not, according to the authorities, be entitled to rank as a legatee.

Upon what principle can the same words in an English statute passed to supply the place of a will, and intended to govern the administration of the estate of a domiciled Englishman, receive a different meaning? I have more than once observed that the estate in this country of an intestate domiciled in a foreign country is administered according to the foreign law, and not under the *Statute of Distributions*, and I cannot help thinking that this distinction has not been always borne in mind, either in argument or in reading judgments or foreign treatises. In such a case it is correct to say that English law recognises the foreign *status*, but it is a mistake to apply this maxim to the administration of the estate of a domiciled Englishman.

I am therefore of opinion that this statute, like any other, must be construed in the sense which the Common Law puts upon its words, and that "children" means such, and such only, as are recognised in our table of consanguinity.

I cannot allow myself to be influenced by considerations of hardship or inconvenience. The question for us is, what the law is, not what we may think it ought to be. Anomalies and absurdities may be pointed out on both sides, some of which, as resulting from a decision in favour of the Appellant, I have already adverted to. For these reasons I am of opinion that the judgment of the Master of the Rolls is right, and ought to be affirmed.

COTTON, L.J.:—

The question in this appeal is as to the right of the Appellant to share in a portion of the personal estate of *Rachel Goodman* as to which she died intestate. *Rachel Goodman* was a domiciled Englishwoman. She died a spinster, and at the time of her death she had neither father, mother, brother or sister. But two of her deceased brothers left children who survived her. *Leyon Goodman*, one of these brothers, had cohabited with *Charlotte Smith*, and while domiciled in *England* had by her three children. He after the birth of these children removed to *Amsterdam*, and he was thenceforth down to the time of his death domiciled in *Holland*. While domiciled there he, in the year 1821, had by *Charlotte Smith* another child, *Hannah*, the present Appellant, afterwards the wife of *Jean Pieret*. *Leyon Goodman*, in the year 1822, married *Charlotte Smith*. The evidence shews that by the law of *Holland* this marriage made *Hannah Pieret* and the three children born while *Leyon Goodman* was in *England* legitimate.

Under the *Statute of Distributions*, 22 & 23 Car. 2, c. 10, the personal estate of *Rachel Goodman* as to which she died intestate was divisible amongst the children of her deceased brothers. No claim was made on behalf of the three children of *Leyon Goodman* born while he was domiciled in *England*, but *Hannah Pieret* claimed to share, and the Master of the Rolls decided against her claim. In support of this decision it was urged that in an English Act of Parliament the nearest of kin must be taken to mean those who by the law of *England* are recognised as nephews and nieces, that is, as legitimate children of the intestate's deceased brothers. This is doubtless correct, but the question is, who are by the law of *England* recognised as legitimate. It was urged in support of the decision of the Master of the Rolls that the law of *England* recognises as legitimate those children only who are born in wedlock. This is correct as regards the children of persons who at the time of the children's birth are domiciled in *England*. But the question as to legitimacy is one of *status*, and in my opinion by the law of *England* questions of *status* depend on the law of the domicil. For this proposition there is authority. It is stated by Mr. Justice *Story* in his book on the Conflict of Laws, paragraph 93, that "foreign jurists generally, though not universally, maintain that the question of legitimacy or illegitimacy is to be decided exclusively by the law of the domicil of origin," and in paragraph 93 e, he states that "the same general doctrine is avowedly adopted by the Courts of *England*." And he refers to the opinion expressed by Lord

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Stowell in *Dalrymple* v. *Dalrymple* (1), that by the law of *England* "the *status* or condition of a claimant must be tried by reference to the law of the country where that *status* originated." Moreover, in the case of *Doe* v. *Vardill*, when it first came before the House of Lords in the year 1830 (2), Chief Baron *Alexander*, when giving the unanimous opinion of the Judges who were consulted, refers with approval to the opinion so expressed by Lord *Stowell* as applicable to a question of legitimacy.

In *Fenton* v. *Livingstone* (3) Lord *Wensleydale*, in a passage already read and which I do not repeat in its entirety, expressed himself thus: "The laws of the state affecting the personal *status* of the subjects travel with them wherever they go, and attach to them in whatever country they are resident."

Vice-Chancellor *Kindersley*, in a passage of his judgment in *Re Don's Estate* (4), to which I shall afterwards refer, lays down the same rule.

If, as in my opinion is the case, the question whether a person is legitimate depends on the law of the place where his parents were domiciled at his birth, that is, on his domicil of origin, I cannot understand on what principle, if he be by that law legitimate, he is not legitimate everywhere, and I am of opinion that if a child is legitimate by the law of the country where at the time of its birth its parents were domiciled, the law of *England*, except in the case of succession to real estate in *England*, recognises and acts on the *status* thus declared by the law of the domicil. In fact the Respondents wish to use the proposition, that "in an English Act of Parliament those only are next of kin or children of a deceased brother whom the law of *England* recognises as legitimate," as if it were "whom the law of *England* would recognise as legitimate if at the time of their birth their domicil, that is the domicil of their parents, had been English."

But, in my opinion, in deciding questions of legitimacy, that is of *status*, the law of *England* looks to the law of the actual, not of an hypothetical, domicil. I am of opinion on principle, that since by the law of *Holland*, where the parents of *Hannah Pieret* were in fact domiciled at the time of her birth, she is legitimate, the law of *England*, for the purpose of succession to personal estate, ought to hold her to be legitimate.

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(1) 2 Hagg. Const. 58.
(2) 2 Cl. & F. 571, 574.
(3) 3 Macq. 547.
(4) 4 Drew. 194. 5 Jur N.S.

This, on principle, is my opinion, but the cases may have established a different rule, and it is necessary to consider the authorities which were relied upon in argument in support of the decision of the Master of the Rolls. The case which was most discussed was that of *Doe* v. *Vardill*, which in the year 1830, and again in 1840, came before the House of Lords. All that was actually decided in that case was, that the eldest son born in *Scotland* before marriage of parents domiciled there, though by Scotch law legitimate, by reason of the subsequent marriage of his parents was not capable of taking land in *England* as heir of his father. The unanimous opinion of the Judges as expressed on two occasions was that he could not, but Chief Baron *Alexander* stated the question to be considered as being, Whether by the law of *England* a man is the heir of English land merely because he is the eldest legitimate son of his father, and though he gives his opinion that he is not, he, particularly in the passage to which I have already referred, treats the general question of his *status*, that is, of his legitimacy, as one to be determined by the law of the place where the parents were domiciled at the time of his birth, and he was then delivering the unanimous opinion of the Judges who had been consulted. When the case was before the House of Lords in the year 1840, Chief Justice *Tindal* delivered the unanimous opinion of the Judges then consulted, and he (1) stated the ground of their opinion to be that they held it to be a rule or maxim of the law of *England* with respect to the descent of land in *England* from father to son, that the son must be born after actual marriage between his father and mother.

Chief Justice *Tindal* does not, it is true, so distinctly as was done by Chief Baron *Alexander*, state the proposition that legitimacy must depend on the law of the country of the parents' domicil at the time of birth, but he treats the *Statute of Merton* as referring only to the question of the right to inherit land in *England*, and in his advice (2) there occurs this passage: "The contest above adverted to was a contest between the ancient law

(1) 7 Cl. & F. 924.

(2) 7 Cl. & F. 932.

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and custom of *England* on the one hand, and the canon law on the other, which should prevail as to the hereditary succession to land in *England*, canon and civil law being acknowledged and prevailing in *England* in all other respects, with the single exception of its application to the descent of land."

The decision in that case, therefore, was not at variance with the rule which, in my opinion, is on principle the correct one, and the opinion expressed by the Judges strongly supports my view. But it was urged that the opinion expressed by the Judges as to the legitimacy of the son born before marriage was intended to apply only to his right to share in the personal estate of the father domiciled in *Scotland*. As the eldest son was admittedly legitimate by the law of *Scotland*, by which the succession to the father's personal estate must be governed, this contention would reduce to a nullity the opinion expressed by the Judges, and in my opinion they did intend to express their opinion that the claimant being legitimate by the law of *Scotland*, where his parents were domiciled at his birth and at the date of their marriage, must be considered as legitimate in *England*, except for the purpose of succession to real estate, and that this depended on a special rule of the feudal law as adopted in *England*. This, in my opinion, was the view taken by Lord *Cranworth* in *Shaw* v. *Gould* (1), which has been already quoted in a different sense.

Vice-Chancellor *Kindersley* took the same view in *Re Don's Estate* (2); he says, "It appears to me that on the authorities applicable to this question, the principle is this, that the legitimacy or illegitimacy of any individual is to be determined by the law of that country which is the country of his origin. If he is legitimate in his own country, then all other civilized countries, at least all Christian countries, recognise him as legitimate everywhere." He then refers to the case of *Doe* v. *Vardill*, and treats it as an exception to the general rule above stated by him founded on the rules of inheritance attached to land in this country.

But although the decision in *Doe* v. *Vardill* is not against the Appellant, and the opinions expressed in that and the other cases to which I have referred are in his favour, the case of *Boyes* v.

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(1) Law Rep. 3 H. L. 70.

(2) 4 Drew. 194, 197. S/pr A Sllg

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Bedale (1), and the opinion expressed by the Vice-Chancellor in that case, are undoubtedly in favour of the decision of the Master of the Rolls. In *Boyes* v. *Bedale* the question was on the construction of a bequest in the will of a domiciled Englishman to the children of a person named. The Vice-Chancellor held that a child exactly in the same position as *Hannah Pieret* was not entitled under the bequest. He said that the will being that of a domiciled Englishman must be construed according to English law, which in my opinion is correct so far as to require that this word "children" shall be construed "legitimate children." But he held that English law recognised as legitimate only those children born in wedlock. This, though correct as regards the children of persons domiciled in *England* at the time of their birth, is, in my opinion, erroneous as to children born of parents who at the time of the birth were domiciled in a country by the law of which the children were legitimate. The Vice-Chancellor, at the end of his judgment in *Boyes* v. *Bedale*, expressed his opinion that any claim under the *Statute of Distributions* would be dealt with in the same way.

Re Wright's Trust (2), also a decision of Lord *Hatherley* when Vice-Chancellor, is not inconsistent with the opinion already given by me, and explains how the children of *Leyon Goodman* born while he was domiciled in *England* make no claim. They, like the children excluded by the Vice-Chancellor in *Re Wright's Trust*, were born while their parents were domiciled in a country by the law of which no subsequent marriage of persons domiciled there could legitimate children born before their marriage. The exclusion of these children is therefore in accordance with the rule as to *status* already expressed by me.

The judgment in *In re Wilson's Trusts* (3), affirmed by the House of Lords under the name of *Shaw* v. *Gould* (4), is not an authority on the question involved in this case. For there, by the law of *England*, the mother of the children had not been effectually divorced from her first husband, and her marriage with the father of the children was void and the children illegitimate. *Boyes* v. *Bedale*, though mentioned with approval by Vice-Chanceller *Kin-*

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(1) 1 H. & M. 798. 10 Jur 45/57
(2) 2 K. & J. 595. 2 Jur 45/45
(3) Law Rep. 1 Eq. 247.
(4) Ibid. 3 H. L. 55.

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dersley in *In re Wilson's Trusts* (1), is really the only decision which supports the judgment of the Master of the Rolls, and *Skottowe* v. *Young* (2) is certainly a decision in favour of the Appellant. In that case the Vice-Chancellor *Stuart* held that children of a testator domiciled abroad, who were in exactly the same position as regards legitimacy as *Hannah Pieret*, were, under the legacy duty Acts, liable to pay duty at the rate of 1 per cent. only, that is, as children of the testator within the meaning of that Act. Moreover, though in *Goodman* v. *Goodman* (3) the point raised on this appeal is not mentioned in the judgment, the Vice-Chancellor *Stuart*, who decided that case, and the counsel who argued it, appear to have assumed that if *Hannah Pieret* was born after her father acquired a domicil in *Holland*, she was to be considered as a legitimate child according to the law of *England*, and entitled as such under the will of the testator in that case. There is therefore a conflict of decisions, and as, in my opinion, the decision in *Boyes* v. *Bedale* (4) is contrary to principle and erroneous, I think that we ought not to follow that case, and that *Hannah Pieret* is to be treated as a legitimate child of *Leyon Goodman*, and as such entitled to share in the personal estate as to which *Rachel Goodman* died intestate.

JAMES, L.J.:—

I concur in the judgment of Lord Justice *Cotton*, both in the conclusion and reasoning. According to my view, the question as to what is the English law as to an English child is entirely irrelevant. There is, of course, no doubt as to what the English law as to an English child is. We have in this country from all time refused to recognise legitimation of issue by the subsequent marriage of the parents, and possibly our peculiarity in this respect may deserve all that was said in its favour by Professor, afterwards Mr. Justice, *Blackstone*, the somewhat indiscriminate eulogist of every peculiarity and anomaly in our system of laws. But the question is, What is the rule which the English law adopts and applies to a non-English child? This is a question of international comity and international law. According to that law as recognised, and that comity as practised, in all other civilized communities, the *status* of a person, his legitimacy or illegitimacy, is to be determined everywhere by the law of the country of his origin—the law under which he was born. It appears to me that it would require a great force of argument derived from legal principles, or great weight of authority clear and distinct, to justify us in holding that our country stands in this respect aloof in barbarous insularity from the rest of the civilized world. On principle, it appears to me that every consideration goes strongly to shew, at least, that we ought not so to stand. The family relation is at the foundation of all society, and it would appear almost an axiom that the family relation, once duly constituted by the law of any civilized country, should be respected and acknowledged by every other member of the great community of nations. *England* has been for centuries a country of hospitality and commerce. It has opened its shores to thousands of political refugees and religious exiles, fleeing from their enemies and persecutors. It has opened its ports to merchants of the whole world, and has by wise laws induced and encouraged them to settle in our marts. But would it not be shocking if such a man, seeking a home in this country, with his family of legitimated children, should find that the English hospitality was as bad as the worst form of the persecution from which he had escaped, by destroying his family ties, by declaring that the relation of father and child no longer existed, that his rights and duties and powers as a father had ceased, that the child of his parental affection and fond pride, whom he had taught to love, honour, and obey him, for whom he had toiled and saved, was to be thenceforth, in contemplation of the law of his new country, a fatherless bastard? Take the case of a foreigner resident abroad, with such a child. If that child were abducted from his guardianship and brought to this country, can any one doubt that the Courts of this country would recognise his paternal right and guardianship, and order the child to be delivered to any person authorized by him? But suppose, instead of sending, he were to come himself to this country in person, would it be possible to hold that he would lose his right to the guardianship of the child in this country because of the historical or mythical legend that the English barons and earls many centuries ago cried out in Latin, *Nolumus leges Angliæ mutare?* Can it be possible that a Dutch father, stepping on board a steamer at *Rotterdam* with his dear and lawful child, should on his arrival at the port of *London* find that the child had become a stranger in blood and in law, and a bastard, *filius nullius?*

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(1) Law Rep. 1 Eq. 247.
(2) Ibid. 11 Eq. 474.
(3) 3 Giff. 643. 8 Jur. N.S. 574
(4) 1 H. & M. 798. 10 Jur. N.S. 71

It may be suggested that that would not apply to a mere transient visit or a temporary commorancy, during which the foreign character of the visitor and his family would be recognised, with all its incidents and consequences, but that it would only apply to a man electing to have a permanent English domicil. But what could, in that view, be more shocking than that a man, having such a family residing with him, perhaps for years, in this country as his lawful family, recognised as such by every Court in the kingdom, being minded at last to make this country his permanent domicil, should thereby bastardize his children; and that he could re-legitimate them by another change of domicil from *London* to *Edinburgh?* And why should we on principle think it right to lay down a rule leading to such results? I protest that I can see no principle, no reason, no ground for this, except an insular vanity, inducing us to think that our law is so good and so right, and every other system of law is naught, that we should reject every recognition of it as an unclean thing.

But it is not merely on principle, but on authority, to my mind conclusive, that this question ought to be determined in favour of the Appellant. I will not go through the roll of authorities which the Lord Justice *Cotton* has cited. But I content myself with the one case of *Doe* v. *Vardill* (1). In that case we have the careful and elaborate judgment of the Judges summoned to advise the House of Lords. And in that judgment, or advice, there are two distinct propositions clearly and distinctly enunciated. The first was that the claimant was for all purposes and to all intents legitimate. The second was that such legitimacy did not necessarily, and did not in fact in that case, include heirship to English land. The first proposition was accepted by the law lords without any doubt or question; the second was questioned. After further reference to the Judges and further hearing, the case was at last determined in accordance with the second

(1) 2 Cl. & F. 571; 7 Cl. & F. 895.

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proposition. But the first proposition has never been really questioned. No doubt it may be said that the only decision was against the heirship in that case. But the weight of such an authority, particularly of advice tendered by the assembled Judges to the House of Lords, is not affected by that consideration. It is the *ratio decidendi*, the rules, maxims, and principles of law which are to be found there by which we are to guide ourselves. In fact, as is well known, the House has frequently put hypothetical states of fact, and abstract questions of law, for the advice and opinion of the Judges, of which I recollect one notable instance in the *D'Este Case* (1). What the assembled Judges said in *Doe* v. *Vardill*, and what the Lords held, was, that the case of heirship to English land was a peculiar exception to the rights incident to that character and *status* of legitimacy, which was admitted by both Judges and Lords to be the true character and *status* of the claimant. It was only an additional instance of the many anomalies which at that time affected the descent of land. Legitimate relationship in the first degree was of no avail if the claimant were an alien, or if he were of the half-blood, or in the direct ascending line, which, *pace* Professor *Blackstone*, were precious absurdities in the English law of real property. But in this particular case, the exception is, at all events, plausible. The English heirship, the descent of English land, required not only that the man should be legitimate, but as it were *porphyro-genitus*, born legitimate within the narrowest pale of English legitimacy. Heirship is an incident of land, depending on local law, the law of the country, the county, the manor, and even of the particular property itself, the *forma doni*. Kinship is an incident of the person, and universal. It appears to me that a statement of the law so given, and so accepted nearly fifty years ago, which has been adopted without question by jurists as a correct statement of English adhesion to the universal law and comity of nations, is not to be questioned at this time by any tribunal short of the House of Lords, and I should humbly think not by them. There is only one authority to the contrary, the case of *Boyes* v. *Bedale* (2), 24 Ch D on which I will say a few words. The decision there was on the ground that, in an Englishman's will, the children of a nephew must mean children who would be lawful children if they were English children. That seems to me a violent presumption. It was an accident in that case that the testator was an Englishman. But supposing it had been the will of a Frenchman, dying domiciled in *England,* and made in favour of his French relations and their children, or of his own children, there being children legitimate and legitimated, what would have been said of such a presumption and such a construction? In that case, by way of *obiter dictum,* the learned Judge goes on to say that the same construction would be applied to kindred under the *Statute of Distributions.* This point was never argued and never considered, I believe, by counsel, and must, I think, have been hastily uttered by the Vice-Chancellor at the close of an oral judgment. It must be borne in mind that the *Statute of Distributions* is not a statute for Englishmen only, but for all persons, whether English or not, dying intestate and domiciled in *England,* and not for any Englishman dying domiciled abroad. And it was to provide for what was thought an equitable distribution of the assets, as to which a man had, through inadvertence, not expressed his testamentary intentions. And, as the law applies universally to persons of all countries, races, and religions whatsoever, the proper law to be applied in determining kindred is the universal law, the international law, adopted by the comity of states. The child of a man would be his child so ascertained and so determined, and, in the next degree, the lawful child of his brother or sister would be his nephew or niece.

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(1) *Sussex Peerage Case*, 11 Cl. & F. 85.

(2) 1 H. & M. 798. 10 Jur n s 196

The real importance of the case of *Dalrymple* v. *Dalrymple* (1) has not been sufficiently appreciated. There must have been hundreds of cases in which a Scotchman or a foreigner with legitimated children, or other kindred, elected to domicile himself for business, or health, or pleasure, in *London* or elsewhere in *England.* Can it be doubted that the English Court of Probate, of whose conception of the law the case of *Dalrymple* v. *Dalrymple* is an authoritative exponent, would, without question, have admitted the right of some child or next of kin to take out administration. And if such right had ever been questioned, would not the fact of such a question, viz., whether a man by changing his domicil had

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(1) 2 Hagg. Const. 54.

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bastardized his child, have created a sensation which would have vibrated throughout the civilized world, wherever there was a writer on international law and comity? The fact that no such case is to be found shews the universal consensus of all persons conversant with the Court of Probate's administration (the appropriate Court in that behalf) that no such question in fact existed.

That consensus goes back not only to the year in which the judgment in *Dalrymple* v. *Dalrymple* (1) was pronounced, 1811, but to the furthest limit to which the knowledge and experience of the learned Judge who pronounced it extended. Moreover, if such a question had ever been raised in the distribution of assets by the Court of Chancery, the Chief Baron *Alexander* must, in his long experience in that Court, have been aware of it, and would not have omitted to refer to it in the advice which, on behalf of the Judges, he tendered to the House of Lords.

The appeal was accordingly allowed.

Solicitors: *Wild, Browne, & Co.*; *Capron & Co.*

M. W.

ARKWRIGHT *v.* NEWBOLD.

[1879 A. 68.]

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FRY, J.
May 29, 31:
June 1, 2, 3, 10.
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1881
Feb. 25, 28.

Rex/p–ge

Company—Prospectus—Companies Act, 1867, *s.* 38—*Contract—Action of Deceit—Measure of Damages.*

The prospectus of a company formed for taking over a business, after mentioning the price to be paid by the company for the business, stated that the remuneration of the directors would be fixed by the shareholders, and that it was proposed that they should be paid only by a commission on the profits made, and that no promotion money would be paid to them by the company. The vendors of the business, who became directors, received part payment in 3000 fully paid-up shares of the company, and an agreement for such part payment was disclosed in the prospectus. Shortly after the formation of the company the vendors transferred 800 of these shares (being of the nominal amount of £4000), as to 350 to the solicitors who had acted in the formation of the company, and as to the remaining 450 to the directors other than the

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(1) 2 Hagg. Consist. 54.

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23 ChD. 308
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11 QBD. 272.

vendors. The Plaintiff took shares on the faith of the prospectus and paid them up in full. Some time afterwards the shareholders discovered the transfer of the 800 shares and removed the directors. A claim was made on behalf of the company against the directors who had received the 450 shares, and they by way of compromise surrendered those shares to the company. The Plaintiff retained his shares, and nearly two years after the transfer to the directors had been discovered he commenced an action against the old directors and the solicitors, alleging that the Defendants other than the vendors had agreed to become promoters on the terms of receiving as remuneration £4000 in fully paid-up shares or money, out of the shares or money to be received by the vendors; that the nominal purchase-money included this promotion money of £4000 as well as the real purchase-money; that the value of the property was not so much as the nominal purchase-money, less £4000; and that the statements in the prospectus were false; and he claimed as damages the whole nominal amount of his shares, on the ground that they had become utterly worthless. It appeared in evidence that at the time when the prospectus was issued, or at least before the Plaintiff took his shares, there was an understanding between the vendors and the other directors that the other directors should receive from the vendors some remuneration, and that on the day when the Plaintiff's application was accepted the transfer of the 450 shares to the other directors was agreed to; but there was no evidence of there having been any understanding for remuneration at the time of the contract for sale to the company, and it appeared that the price agreed to be given by the company was a fair one:—

Held, by *Fry*, J., that although the understanding that the directors should receive remuneration was not such a contract as is required to be specified in the prospectus by sect. 38 of the *Companies Act*, 1867, the concealment of the arrangement was material misrepresentation, and made the prospectus fraudulent irrespectively of the statute; and that the Plaintiff was entitled to recover by way of damages the excess of the money paid for his shares over the real value of them at the time when he took them.

Held, on appeal, that the case was to be decided, not according to the principles applicable to an action to rescind the agreement by the Plaintiff to take shares, but according to the principles applicable to a common law action for deceit; that, there being no arrangement for the directors to receive any promotion money from the company, the prospectus did not contain any misstatement on which an action for deceit could be grounded; and that the action must be dismissed.

FOR some time previous to the 19th of April, 1875, *John Taylor Newbold* and *Ralph Taylor Newbold* had carried on business as paper manufacturers at mills near *Bury* in *Lancashire*. In that month they made arrangements for transfer of their business to a company formed for the purpose, called the *Heap Bridge Paper Company, Limited*. The memorandum and articles of association were dated on the 19th of April, 1875, and the company was registered on the 6th of May in that year.

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By a contract dated the 19th of April, 1875, made between the *Newbolds* of the one part, and *W. Flitcroft*, as a trustee for the company, of the other part, the *Newbolds* agreed to sell to the company the whole of the business premises, including all fixed and loose machinery, plant, utensils, &c., for £32,500, and to sell the stock-in-trade at a valuation; the vendors agreeing to leave on mortgage not less than £16,250 at £5 per cent. interest for six months, after which time £11,250 might remain for two years at least, and then be subject to six months' notice on either side. The vendors further agreed to accept £15,000 of the balance of the purchase-money in fully paid-up shares. This contract was duly registered.

The memorandum stated the object of the company to be (*inter alia*) the purchase of the business on the terms of the agreement. The capital was stated to be £32,500 in 6500 shares of £5 each.

The subscribers to the memorandum were the two *Newbolds* and five other persons, each of whom signed the memorandum for ten shares. By the articles the first directors were to be appointed by the subscribers to the memorandum, and until such appointment the subscribers were to act as directors. The first directors and any directors appointed by them were to continue in office until the ordinary general meeting in 1875, which was to be held not more than four months after the incorporation of the company.

On or about the 21st of April, 1875, a prospectus was issued by the company, which, after stating that the capital was £32,500 in 6500 shares of £5 each, of which the vendors took 3000 paid-up shares as part of the purchase-money, and that the remaining 3500 only were issued to the public, and that the business would be taken over by the company as a going concern, and stating the above contract between the vendors and *Flitcroft*, proceeded as follows:—

"It is believed that the very favourable terms which have been made with the vendors, particularly with regard to the large amount left on mortgage, and consequently the small amount of capital upon which dividends will be paid, the low ground rent charged for the land, and the convenient situation of the mill as regards coal, carriage, and water, will enable the directors to make the present an exceptionally remunerative investment.

"The remuneration of the directors will be fixed by the shareholders, and it is proposed that they should be paid only by a commission on the profits made, no promotion money whatever being paid to them by the company, and all formation expenses being paid by the vendors."

On the 23rd of April, 1875, the Plaintiff applied for 120 shares, and on the 3rd of May for eighty more. The first meeting of the subscribers to the memorandum was held on the 17th of May, and they appointed themselves provisional directors till the first general meeting. At the same meeting 200 shares were allotted to the Plaintiff, which he accepted and subsequently paid them up in full. At the same meeting *Grimes* and *Flitcroft*, two of the subscribers of the memorandum, were appointed to act on behalf of the company in the valuation of the stock-in-trade.

On the 3rd of June, 1875, the vendors transferred to each of the five other subscribers to the memorandum, and to *Ramwell* and *Hindle*, who had acted as solicitors in the formation of the company, a number of fully paid-up shares. The shares thus transferred amounted in all to 800, of which the solicitors received 350. The first meeting of the company was held on the 11th of August, 1875, and the subscribers to the memorandum were elected directors for the first twelve months. The company at first went on prosperously and paid dividends, but after a time the paper trade in *Lancashire* became depressed and no profits were made.

On the 16th of June, 1877, an extraordinary meeting of shareholders was held, at which a resolution was passed appointing a committee of investigation. This committee made a report stating the transfer of the above 800 shares. At the third general meeting of the company, on the 18th of August, 1877, a new body of directors was appointed.

Some correspondence then took place between the company and the transferees, in which the latter insisted that there was nothing illegal in the transfer to them, but ultimately an agreement, dated the 17th of January, 1878, was entered into between the company and the five transferees other than the solicitors, by which, by way of compromising all matters in dispute, the five transferees agreed to give up to the company or its nominee the shares which had been transferred to them, and the company agreed to accept such surrender in full of all claims against the five transferees in respect of the shares and of the dividends thereon, and in respect of the sale by the vendors to the company and of the formation and promotion of the company.

The Plaintiff did not seek to be relieved from his shares, but on the 4th of June, 1879, he commenced the present action against the subscribers to the memorandum (except one named *Mills*, whose affairs were in liquidation) and the solicitors. By the statement of claim, after stating the registration of the company and its objects, he went on to state (paragraph 3) that before the date of the agreement of the 19th of April, 1875, the *Newbolds*, being desirous of selling their business, proposed to the other Defendants and *Mills* that they should assist in the formation of a company to purchase and take over the business, and should act as promoters, and become directors and officers of such company; that the other Defendants and *Mills* agreed to the proposal on the terms of receiving from the *Newbolds*, by way of remuneration for acting as such promoters, a certain amount in fully paid-up shares or money out of the shares or money which the *Newbolds* should receive for the sale; and that it was accordingly agreed and understood by and between the Defendants and *Mills* that the purchase-money to be paid by the company should include the amount of remuneration or promotion money to be paid by the vendors to the other promoters as aforesaid, and the purchase-money of £32,500 was fixed upon that basis. He then went on to allege that the Defendants and *Mills* all acted as promoters, and all of them, except the two solicitors, acted as provisional directors, and afterwards became directors of the company; and that the Defendants and *Mills* issued the prospectus of which the parts above referred to were set forth. The Plaintiff alleged that he was thereby led to believe, and did believe, that the persons named as directors had a *bonâ fide* and independent pecuniary interest in the company. He further alleged that the prospectus did not disclose the existence of the preliminary agreement mentioned in paragraph 3—that the statements in the prospectus were, as the Defendants well knew, false and fraudulent, and calculated to mislead—that it was not the fact, as the Defendants well knew, that the whole of the £32,500 was purchase-money of the business and premises—that the Defendants well knew that the £32,500 included promotion money as well as purchase-money—that it was not the fact, as the Defendants well knew, that no promotion money was paid or to be paid to the directors, as alleged in the prospectus, but, on the contrary, promotion money was to be paid to the directors out of the funds of the company. The Plaintiff further alleged that he, on the faith of the prospectus, believing the statements therein to be true in every particular, and to set forth all that was material for persons intending to take shares to know, applied for and had allotted to him the 200 shares, and that he had no notice of the agreement mentioned in paragraph 3 till long after his shares had been fully paid up. The statement of claim then stated the transfers of shares to the Defendants other than the *Newbolds,* in pursuance of the alleged preliminary agreement mentioned in paragraph 3, and proceeded to allege that at the date of the sale to the company the value of the vendors' business and premises was much less than £28,500; that no more than £28,500, part in money and part in shares, was intended to be purchase-money, and that the residue, consisting of 800 paid-up shares, only colourably formed part of the purchase-money, but really was the promotion money of the Defendants other than the vendors and of *Mills.* That the shares allotted to the Plaintiff were worthless, and the Plaintiff had lost the money which he had paid to the company in respect of them, and that the Plaintiff relied upon the concealment of the agreement mentioned in paragraph 3 as a fraudulent representation apart from the 38th section of the *Companies Act,* 1867, as well as upon the operation of that section.

The claim asked that it might be declared that the Plaintiff had been induced to take his shares by the fraudulent misrepresentations and contrivances of the Defendants; that the Defendants might be declared jointly and severally liable to pay, and accordingly be ordered to pay, to the Plaintiff the £1000 paid by the Plaintiff for his shares, with interest from the day of payment; that the Defendants might be ordered to pay to the Plaintiff the costs of the action, and all other damages and expenses which he might have incurred or sustained by taking the shares; and for further relief.

The evidence was taken *vivâ voce*, and Mr. Justice *Fry* came to the conclusion that at the time when the prospectus was issued there was no contract by the vendors to remunerate the directors, though there was some vague understanding that the vendors should give the directors some remuneration. His Lordship, however, considered it to be made out that the transfer to the directors had been agreed to at the time when the Plaintiff took his shares. One of the *Newbolds* was examined and cross-examined, and his account of the transaction was, that on the afternoon of the 17th of May, 1875, after the meeting of the directors on that day, conversations took place between the vendors and some of the directors; that the directors said they could not give their time and trouble, as they would have to do if they became permanent directors, without some remuneration, and the vendors agreed to talk it over and see what they could do for them. Shortly after this the vendors resolved to transfer 450 shares to the five provisional directors other than themselves, and these gentlemen accordingly consented to be named as permanent directors. The witness stated to the effect that the directors, especially *Grime* and *Flitcroft*, were persons of experience in the trade, whose services were likely to be of great value to the company, and that the vendors, who retained a large interest in the company, thought it worth their while to secure their services on these terms.

The Plaintiff completely failed to establish by evidence that the real purchase-money was £28,500, and that £4,000 was added to it for promotion money. It was shewn that a few weeks before the formation of the company an offer had been made by Messrs. *Carlyle*, who were paper manufacturers in a large way of business, to buy the property for a sum exceeding £30,000, to be paid in money, part of which was to remain on mortgage of the property, and that the offer had been declined as being too low, and there did not appear to be any ground for considering that £32,500 was an unreasonable price.

The cause came on for hearing before Mr. Justice *Fry* on the 29th of May, 1880.

North, Q.C., *H. A. Giffard*, and *Lockwood*, for the Plaintiff:—

The contract by Messrs. *Newbold* to pay their co-directors in paid-up shares ought to have been disclosed in the prospectus, and as it was not specified therein sect. 38 of the Act of 1867 applies: *Charlton* v. *Hay* (1); *Cornell* v. *Hay* (2); *Gover's Case* (3); *Twycross* v. *Grant* (4); *New Sombrero Phosphate Company* v. *Erlanger* (5); *Bagnall* v. *Carlton* (6). As to the measure of damages, the Plaintiff is entitled to the whole of the money he gave for the shares: *Twycross* v. *Grant*; *Henderson* v. *Lacon* (7); *Weston's Case* (8); *Davidson* v. *Tulloch* (9).

Kay, Q.C., *Addison*, Q.C., and *Romer*, for the Defendants:—

No such contract is proved or even suggested as the 38th section requires to be specified; at most there was no more than an understanding.

Therefore, that section does not touch the case, and the cases cited for the Plaintiff under the section have no application.

Neither was there any concealment amounting to fraud irrespectively of the 38th section.

As to the measure of damages, they cannot be more than the difference between the £1000 paid by the Plaintiff for his shares, and their market price when he became aware of the circumstances he complains of.

FRY, J., after stating the facts as to the alleged contract, continued:—

There is no evidence before me on which I can come to the conclusion that there was any contract to that effect at the date of the issue of the prospectus, though I think there was that which is sometimes called an understanding, that there was some negotiation, and some expectation to that effect.

Contract, however, is different from that kind of vague expectation or understanding to which I have referred, and in my judgment I cannot extend the language of the statute, and unless I am judicially satisfied that a contract existed before the issue of the prospectus which is not therein stated, I cannot hold the prospectus to be fraudulent under the statute.

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(1) 23 W. R. 129.

(2) Law Rep. 8 C. P. 328.

(3) 1 Ch. D. 182.

(4) 2 C. P. D. 469.

(5) 5 Ch. D. 73; 3 App. Cas. 1218.

(6) 6 Ch. D. 371.

(7) Law Rep. 5 Eq. 249.

(8) 10 Ch. D. 579.

(9) 3 Macq. 783.

The Plaintiff, in the next place, says that independently of the statute this prospectus is fraudulent. [After reading the clause as to the remuneration of directors, he continued:—] If the proposal that the directors should receive these shares by way of payment was made previously to the issue of the prospectus, I am of opinion that the prospectus was false in stating that the directors would be paid only by a commission on the profits made; the Defendants now state that there was a proposal that the directors should be paid not only by commission but by shares to be transferred to them by the vendors. The word "only" seems distinctly to negative the existence of any proposal for the payment of the directors by any other means than by a commission on the profits. The misstatement was, in my opinion, a material one, because one of the most important duties of the directors, other than the vendors, was to watch over the contract between the vendors and the company, which was then *in fieri*, and which throughout every step of its execution required the vigilant oversight of independent agents for the company. At the meeting of the 17th of May two of these directors who were not vendors were appointed agents to value for the company, and it was material for an intending shareholder to know whether these directors, in whom he was placing confidence, were or were not receiving a remuneration from the vendors. I use the word "remuneration," which is perhaps the most colourless and indifferent word that I can use. Stronger words have been used with regard to it, and I am far from saying that such words are inapplicable. But, in my judgment, the fact which was suppressed and the contrary of which was stated was a fact of the last importance for the shareholders to know, and therefore I hold that there is a misstatement in the prospectus on a serious and important point. Then arises the question whether this proposal had been made at the time when the prospectus was issued, because, if it was not made at that time, of course there was no misstatement in the prospectus at the time of issue. [After reviewing the evidence, he held as a fact that the 800 shares transferred to the directors must have been proposed, if not agreed, to be given before the date of the prospectus for services connected with the promotion of the company, and not merely to induce them to remain directors; and continued:—] I hold, therefore, on the balance of the evidence, that at the date of the issue of the prospectus there was an understanding, or agreement, or proposal, that this remuneration or some remuneration should be paid to the directors, inconsistent with the allegation of the only proposal stated in the prospectus.

But I will assume that I am wrong in that conclusion, and I will take the story as told by the *Newbolds* now, which is that after the meeting of the 17th of May they had separate interviews with *Grime* and *Flitchcroft*, with the two solicitors, and the other group of directors, and that on that occasion the proposal was made and acceded to in general terms, that the directors should receive the remuneration. What is the effect of that? It is that the statement which had been made in the prospectus, though true at the time of its issue, had become untrue by virtue of the subsequent proposal. What is the duty of a person who knows that another is contracting with him, upon the faith of a statement made by him which at the time it was made was true, but which has become untrue before the proposal has been accepted? It does not want authority to shew that the duty of such a person is to disclose to him with whom he is contracting the subsequent untruthfulness of the statement which at the time it was made was true. If authority were wanting, abundant is to be found in the cases of *Reynell* v. *Sprye* (1) and *Henderson* v. *Lacon* (2). The statement in the prospectus had thus been rendered untrue, in my opinion, before the complete acceptance of the Plaintiff's contract to take shares, and on that ground I hold that this contract was induced by a statement which was known by the directors to be untrue at the time he entered into the contract.

A question has been considerably argued before me with regard to the point how far silence is fraud. Undoubtedly as a general rule when there are two contracting parties, each may hold his tongue, but if one says something, it may create an obligation to

(1) 1 D. M. & G. 691.

(2) Law Rep. 5 Eq. 249.

say something more, and it appears to me to be well worthy of consideration whether a person putting out a prospectus does not undertake to say, "I am telling you everything which it is really material for you to know, and I am putting before you the whole prospect of the enterprise on which you are entering."

There is, it appears to me, considerable reason to hold on principle, and even on authority, that such a view might be maintained, but in the present case it does not appear necessary to decide that point, because in the view I take there was actual misrepresentation in the prospectus at the time the contract for the shares was entered into by the company with the Plaintiff.

On these grounds I hold that the Plaintiff has succeeded in shewing that fraudulent misrepresentation in the prospectus which would entitle him to have the contract rescinded.

But he has not rescinded the contract. He has taken a totally different course. He has, after knowledge of the fraud in the prospectus, for so it appears to me I must hold, thought fit to hold his shares, and those shares have become of very much less value to him, and he now seeks to recover the whole value of those shares from the Defendants. It appears to me to be a very serious question, and one on which I desire further opportunity of consideration, whether the Plaintiff has shewn that the damage which he has sustained in holding these shares has really resulted from the fraud of the Defendants. Upon that point, therefore, I reserve further consideration.

June 10. FRY, J.:—

The question which I reserved for my further consideration is with regard to the damage done in this case.

According to the view which I took the Plaintiff was induced by the fraud of the Defendants to take shares in a paper mill as a going concern, the prospectus stating that the directors were paid by commission; whereas in fact they were receiving remuneration from the vendors. The company for a time went on paying dividends, but ultimately ceased to pay them in consequence of the fall in value of the paper which was being manufactured. Afterwards, when the transaction between the vendor and some of the directors came to the knowledge of the other directors, an investigation took place which led to a displacement of the directors from the office which they held. In this state of circumstances the Plaintiff says the directors are liable to repay to him the entire amount—the full value of the shares taken by him; the Defendants, on the other hand, allege that the failure of the company being owing to circumstances unconnected with fraud, the Plaintiff has suffered no damage and is not entitled to relief.

The first question, therefore, is, what is the measure of damages in a case in which the Plaintiff has been induced by the fraud of the Defendants to become a shareholder or to purchase the shares of some company? That may be answered by the authority of two cases; one is the case of *Davidson* v. *Tulloch* (1), in which the Defendant was induced by the fraudulent misrepresentations of the Plaintiff to buy shares in a company, and a contract with a third party for the sale of the same shares was not repudiated. The Court allowed the action to be maintained, and Lord Chancellor *Campbell*, in giving judgment in the House of Lords, said: "But then comes the manner in which the damages are calculated. The proper mode of measuring the damages is to ascertain the difference between the purchase-money and what would have been a fair price to be paid for the shares in the circumstances of the company at the time of purchase." And in the case of *Twycross* v. *Grant* (2) the Lord Chief Justice of *England* uses this language: "If a man is induced by misrepresentation to buy an article, and while it is still in his possession it becomes destroyed or damaged, he can only recover the difference between the value represented and the real value at the time he bought." I have, therefore, to ask myself what is the difference between what the Plaintiff actually paid and what would have been a fair price to pay for the shares in the real circumstances at the time? The Plaintiff by virtue of the representation of the Defendants believed he was buying an interest in a going concern, a share in a living organism. In fact he was buying shares in a concern of which the officers were committing a fraud upon him. They were persons whom he could not reasonably trust. Instead of buying

(1) 3 Macq. 783.

(2) 2 C. P. D. 469, 544.

an interest in a living concern he was really buying an interest in a dead one.

Now, there is no evidence as to the amount of the difference between the sum that was actually paid and the value of the shares at the time of the purchase. If I thought that a reference to Chambers would result in any really useful evidence on this point being adduced, I should not hesitate to direct it. But in my judgment it is not likely that any useful evidence would be adduced, though I daresay much evidence of some sort might be given, the nature of which I can anticipate, and without which I think I can as a jury assess the damages as fairly as with it.

I think a fair sum to be paid for damages would be one moiety of the purchase-money.

That which was bought as a going concern would not have fetched more than half what it would have done had it been sold as a dead concern. I therefore award £500 for damages, and I give the Plaintiff the costs of the action.

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The Defendants appealed. The appeal came on for hearing on the 25th of February, 1881.

Kay, Q.C., *Addison*, Q.C., and *Romer*, for the Appellants:—

There is no evidence of fraud. *Newbold's* evidence, if believed, is conclusive as to there having been none. Nothing was said about what the directors were to receive till after the prospectus was issued, the first vague talk about something being given having taken place on the 17th of May, 1875. Mr. Justice *Fry* did not believe the witness; but that does not supply the want of any affirmative evidence that a gift to the directors had been arranged before the prospectus. The prospectus was true. Mr. Justice *Fry* reads it as if it had said that the directors should not receive anything from anybody except what the shareholders determine to give them; but the prospectus does not say so. No case is made by the claim except that there was originally an agreement with the vendors that £4000 should be divided among the promoters, and that this £4000 was added to the purchase-money. This is absurd, for the vendors had refused an offer to purchase in cash at a higher price than this arrangement would

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give them. The Plaintiff alleges that he was deceived in that respect, but he does not allege that he was deceived by their receiving a premium *aliunde*. In an action of deceit the Plaintiff must prove the case he alleges, he cannot fall back on a case which he has not pleaded: *Mowatt* v. *Blake* (1); *Wilde* v. *Gibson* (2); *New Brunswick, &c., Company* v. *Conybeare* (3). The cases of *Cargill* v. *Bower* (4) and *Eaglesfield* v. *Marquis of Londonderry* (5) are against the Plaintiff. This is not an action to rescind, it is nothing but a common law action for deceit proceeding on the assumption that the complainant elects to keep the subject-matter of his bargain, and he cannot have any relief unless he can shew actual damage. If I am induced to buy a picture by the statement that it comes out of the gallery of some well-known collector, I cannot recover damages on the ground that it did not, if the picture be worth what I gave for it.

[JAMES, L.J.:—That appears a dangerous doctrine. If I could repeat the representation as true, I could sell the picture for more.]

That consideration at all events cannot apply here: the Plaintiff bought in substance a share of a mill, and if the mill was worth the price paid for it, he has sustained no damage. The evidence shews that the price was fair. The diminution in value of the shares was not owing to the price being too high, but to the state of trade. The damages were complete on the day when the Plaintiff got his shares, though they might not be capable of being ascertained then. The mill was worked profitably for some time, and the shares remained fully worth their nominal value. The Plaintiff therefore sustained no damage. The cases all shew that the measure of damages is the difference between the value of what was bought and the price given for it, and there cannot be a verdict for nominal damages on the ground of a wrong having been done if there is no real damage: *Davidson* v. *Tulloch* (6); *Sullivan* v. *Mitcalfe* (7); *Twycross* v. *Grant* (8); *Sedgwick* on Damages.

(1) 31 L. T. (N.S.) 387.
(2) 1 H. L. C. 605, 621.
(3) 9 H. L. C. 711, 724.
(4) 10 Ch. D. 502.
(5) 4 Ch. D. 693.
(6) 3 Macq. 783. 8 Jur N.S. 571
(7) 5 C. P. D. 455.
(8) 2 C. P. D. 469.

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North, Q.C., and *H. A. Giffard*, for the Plaintiff:—

It is not proved that the arrangement for remunerating the directors was made before the prospectus was issued, and we therefore do not urge that the case is within sect. 38. We say, however, that there was at the time when it was issued an understanding that the promoters should receive a remuneration, and that this makes the prospectus false. Its fair meaning is that the directors were to receive the remuneration here mentioned and not receive anything else from anybody: the word "only" imports this.

[THE COURT intimated dissent from this.]

The insertion of the words "by the company" would not alter the meaning of the sentence to the understanding of an ordinary reader.

[JAMES, L.J.:—Suppose the prospectus had been issued by a financial agent who had the same knowledge as the directors had, could the action have been successfully brought against him?]

We say that it could, and that, moreover, the directors are not in so good a position as such an agent.

[JAMES, L.J.:—Can anything which occurred after the board meeting which allotted the shares be carried back by relation so as to make the prospectus false?]

The shares had not been actually allotted, and the statement was false when they were.

[JAMES, L.J.:—Was not the resolution of the board meeting an allotment? Nothing remained to be done but formal acts, and no director could have stopped the issue of the shares.]

The board could have done so and ought to have done so, as the prospectus became false before the allotment had been communicated to the Plaintiff.

[COTTON, L.J.:—Will an action of deceit lie, under such circumstances, on the ground that there is a continuance of the representation?]

Henderson v. *Lacon* (1) supports the view that it will.

[COTTON, L.J.:—There the prospectus was false when issued.]

The observations in *Reynell* v. *Sprye* (2) go to the point. Acting on a representation which has become false is a ground for relief: *Gilbert* v. *Endean* (1).

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(1) Law Rep. 5 Eq. 249, 261.

(2) 1 D. M. & G. 660.

[JAMES, L.J.:—That was a case of rescinding a contract, not an action for deceit.]

If there is not a precedent in point, we submit that the Court ought to make one; for there is no difference in principle between the making a false statement and the not withdrawing a statement which, if made now, would be false. Then as to the pleadings, the cases cited are all cases before the old Court of Chancery, where a party was more liable to be taken by surprise, if the matter was not regularly pleaded, than he is under the present mode of precedure. Considering the state of our knowledge before the trial, the Court ought to hold the pleadings to be such that relief can be given, the Defendants having had sufficient notice of the case they have to meet. The shares are now valueless, and their nominal amount is the measure of damages. The Plaintiff did not get shares in such a company as was represented in the prospectus, but in a company in which the directors were in league with the vendors, and the two of them who were to value on behalf of the company had received a large premium from the other side.

[JAMES, L.J.:—They had, as shareholders, a direct personal interest in keeping down the amount of the valuation.]

According to the Appellant's story, what was done was innocent as between them and the company.

[COTTON, L.J.:—I agree that the acceptance of the shares by the directors was improper, and I think that if they had not given them up by the compromise, they could have been compelled to give them up; but whether their accepting them falsifies the prospectus so as to lay ground for an action of deceit is quite another question.]

JAMES, L.J.:—

I am of opinion that the judgment of the learned Judge in this case cannot be sustained. It appears to me, with all deference to him, that there has been on his part a confusion, if I may use the expression, between two different wrongs and two different remedies—between the question what *mala praxis* on the part of vendors and persons standing in a fiduciary position to a purchaser is sufficient to entitle the purchaser to rescind the contract, and the question what *mala praxis* is sufficient to enable him to maintain an action of deceit. There are a number of purely equitable considerations which arise when the Courts are dealing with actions to set aside contracts or conveyances which have been obtained by means of misrepresentation of a fact, or by means of concealment or suppression of a fact which in the opinion of the Court ought to have been stated. Those cases stand by themselves, and are entirely distinct from such a case as we have before us. In the present case it is merely an accident that some of the Defendants were directors. It is a mere accident that the other Defendants were solicitors engaged in the transaction. The action would have been exactly the same if it had been brought against a financial agent who had been employed for a commission to float this company, and who had issued this prospectus with all the knowledge which the directors and solicitors had of the facts. The Defendants in the present action are to be treated here and made liable on exactly the same grounds, and to the same extent and no other, as any such person employed to float the company would have been liable—that is, the case must be made out as alleged, that the Plaintiff was deceived by the false representation which he alleges to have been made by the persons who prepared and issued the prospectus.

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(1) 9 Ch. D. 259.

I am of opinion that no such misrepresentation has been made. It has been conceded throughout that there was misconduct, that is to say, improper dealing between the vendors and the persons whom they procured to become directors—a kind of transaction against which the Courts always have, and I hope always will, very strongly set their faces. But we have to see whether there was, to use the language of Lord *Cairns* in *Peek* v. *Gurney* (1), that which must be proved, "Some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact as that the withholding of that which is not stated makes

(1) Law Rep. 6 H. L. 377, 403.

that which is stated absolutely false." Supposing you state a thing partially, you may make as false a statement as much as if you misstated it altogether. Every word may be true, but if you leave out something which qualifies it, you may make a false statement. For instance, if pretending to set out the report of a surveyor, you set out two passages in his report, and leave out a third passage which qualifies them, that is an actual misstatement. The statement made must be either in terms or by such an omission as I have stated an untrue statement, and no mere silence will ground the action of deceit. In my opinion there is in this case nothing amounting to any misstatement whatever. The prospectus states that the company had agreed to buy the property for £32,500, part of which was to remain on mortgage for a certain time, and the residue for some time longer. That was the price agreed to be given for it, and that is what the party who is invited to take shares is told; and then he is told that the remuneration of the directors will be fixed by the shareholders, and that it is proposed that they shall be paid only by a commission on the profits made, no promotion money whatever being paid to them by the company, and all formation expenses being paid by the vendors. To my mind every word of that statement is true. It was proposed by the articles that the remuneration of the directors should be fixed by the shareholders, and, as far as I know, it was true that it was then the intention of the promoters to propose that that remuneration, when it came before the shareholders, should not be by way of a fixed salary, but should be by a commission on the profits made. Then the prospectus goes on to say, "No promotion money being paid to them by the company, and all formation expenses being paid by the vendors." What is said comes to this. "The property is sold to the company for £32,500; for that sum you have the thing freed from all charges and expenses, you will not have to pay any promotion money to the directors, you will not have to pay any formation expenses of any kind, the vendors will do all that."

The case presented to the Court on the statement of claim was that the prospectus was false in this way. The Plaintiff says: "It is true that the nominal price was £32,500, and that the company was to pay nothing more by way of promotion money to the directors; but what you really did was this: you met together, you formed your scheme, you settled £28,500 as the real price, and that was the real bargain made"—for that is what it must come to—"you agreed to sell to somebody on behalf of the intended company for £28,500, and when you had made that agreement, then, to enable you to say that the company was not going to pay promotion expenses, you altered the price from £28,500 to £32,500 for the purpose of getting £4000 from the company to go as promotion money." That was the case made by the pleadings, and which, in my opinion, entirely broke down, there being no evidence or reason to suspect that anything of the kind had taken place. Of course every vendor necessarily fixes the price so as to cover the expenses which he knows he will have to pay. Nobody was ever lucky enough to sell a property without having some considerable deduction made out of the gross price, there being such persons as auctioneers and solicitors to be paid, who take a considerable proportion. But in order to make out the case of promotion money being paid by the company, it must be shewn that the price was swollen and exaggerated purposely and fraudulently for the purpose of making the company pay promotion money in addition to what was understood to be the real purchase-money between the parties. That case has to my mind failed, and it seems to me that, if it has failed, it is utterly impossible to fall back on that which the Judge in the Court below has fallen back upon, namely, the fact that the vendors were paying to the directors a remuneration in addition to and besides the remuneration which the directors were to look to from the company itself. I have not said anything about how the evidence presents itself to my mind. Even if I differed from the learned Judge in the Court below as to the weight to be given and the credibility to be attached to the evidence given by the several witnesses in this case, we could not safely dissent from the conclusion arrived at by a Judge who had the opportunity of seeing the manner in which the different witnesses gave their evidence. Therefore I do not express or even hint any dissent from the conclusions at which the Judge below arrived as to matters of fact; but it does not strike me as extraordinary that so large a sum should be given to gentlemen undertaking the office of directors, when that sum was only given them in shares which would be of no value unless they made them valuable by their own exertions, which exertions would tend greatly to the benefit of the vendors, who retained so large an interest in the company.

COTTON, L.J.:—

I am of the same opinion. I think it is in this case essential to consider what the action is, and I say so because a great deal of the argument and a considerable portion of the learned Judge's judgment does not, in my opinion, draw a sufficient distinction between an action of deceit and an action or proceeding to set aside a purchase, or to make the directors of a company answerable for money which they received by reason of their being in a fiduciary position. An action of deceit is a common law action, and must be decided on the same principles whether it be brought in the Chancery Division or any of the Common Law Divisions; there being, in my opinion, no such thing as an equitable action for deceit. It is a common law action in which it is necessary to prove that a statement has been made which, to the knowledge of the person making it, was false, or which was made by him with such recklessness as to make him liable just as if he knew it to be false, and that the Plaintiff acted on that statement to his prejudice or damage.

Much has been said about omission. Of course I adopt what was said by Lord *Cairns*, that the omission of something in a prospectus or any other document may make the statement contained in it false, as for instance, if it contained the statement of a covenant and omitted to state the fact that the covenant had been released; but mere omission, even though such as would give reason for setting aside a contract, is not, in my opinion, if it does not make the substantive statements false, a sufficient ground for maintaining an action of deceit. This also must be borne in mind, that, in an action for setting aside a contract which has been obtained by misrepresentation, the Plaintiff may succeed, although the misrepresentation was innocent; but in an action of deceit the representation to found the action must not be innocent, that is to say, it must be made either with knowledge of its being false, or with a reckless disregard as to whether it is or is not true.

That difference is material in regard to the question whether or not the Plaintiff in this action is entitled to succeed.

We must first deal with the facts of the case as found by Mr. Justice *Fry*. I repeat what has been said by Lord Justice *James*, that I consider myself bound by the conclusions of Mr. Justice *Fry* as regards the credit to be given to the witnesses; for he saw and heard them, and it would be wrong in principle for us, who can only look at the paper record of what took place, to differ from the conclusion of fact at which he arrived, having regard to the credit which, in his opinion, ought to be given to the witnesses. Therefore I adopt what he found in favour of the Plaintiff, that is to say, that there was at least a proposal before the issue of the prospectus (which I understand is his finding) that these shares should be given to these directors, and that there was a proposal probably before the contract that something should be done for the directors. He also clearly finds that there was no bargain or contract for the remuneration of the directors previously to the issue of the prospectus, nor, *à fortiori*, previously to the agreement for sale of the estate.

But the Respondent has contended, and I think he was entitled to contend, that the learned Judge did not go sufficiently far in his favour as regards the existence of a bargain before the contract of the 19th of April was made; but I think that the evidence does not support that contention. There is no evidence, in my opinion, to shew that there was any contract or agreement between the vendors and the other Defendants antecedently to the 19th of April, and all the circumstances are against the supposition that the real purchase-money was £28,500, and was loaded with the sum of £4000 in order to pay promotion money. The vendors had refused a previous offer by a Mr. *Carlyle* of £30,000 in cash. I do not mean by "cash" that the whole of the money was to be paid down at once, but it was cash as distinguished from the way in which the purchase-money in the present case was to be paid, namely, partly in shares and partly in money. It is therefore in the highest degree improbable that the real purchase-money agreed on here between the *Newbolds* and the trustees for the company was £28,500. In my opinion the only conclusion at which we can properly arrive on the evidence before us, is, that

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the sum of £32,500 was the real purchase-money, that is to say, the sum agreed upon between the *Newbolds* and *Grimes* and *Flitcroft* as the sum which was to be paid as the purchase-money of the property to the *Newbolds* without any agreement which could in any way bind them to deal with any portion of that purchase-money in any particular way.

That being so, what is the result as regards this action? There is only one clause of the prospectus which is said to contain misstatements. The general effect of that clause is this—it stated to the intending shareholders what it was that had been paid or was to be paid by the company, and by the company only. That being the general effect of the clause, it divides itself into two branches as regards the argument, first, as to promotion money paid to the directors, and secondly, as regards the sum paid to them, if it was so paid to them, to induce them to become permanent directors, or as payment for their services as directors.

Before I go into the question about the promotion money, which is the case raised by the pleadings, I will make this observation, that nothing is said in the prospectus as to any payment to be made to the solicitors, and therefore a payment made to them cannot falsify any statement in the prospectus. The formation expenses are to be paid by the vendors. It may be that this money was paid to the solicitors under such circumstances (I do not say that it was) as to give a ground for setting aside the contract, or for enabling the money to be recovered from them. On that I give no opinion whatever, but I only advert to this, that there is no statement in the prospectus as regards any payment to be made to the solicitors of the company. I do not dwell further on that point, but I will deal with the case as if it were against directors only.

As regards promotion money the statement is precise, "no promotion money whatever being paid to them by the company." It is desired to strike out the words "by the company." But is that right? It is true that a person who issues a statement is not only answerable for what he in his own mind intended to represent, but he is answerable for what any one might reasonably suppose to be the meaning of the words he has used. Can it be said that the Plaintiff could reasonably, on reading the prospectus,

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disregard the words "by the company," and consider it as stating that no promotion money had been or was to be paid to them by anybody? It is distinctly "by the company." If the statement was so worded that it could reasonably be looked upon as intended to persuade the intending shareholders that nothing would be paid by the vendors, then the persons issuing the prospectus must take the consequences; but we must not put an unnatural and unreasonable interpretation on what they say, and then hold them liable in an action of deceit, if the statement, as so interpreted, is untrue. When once it is established that there was no bargain before the contract of the 19th of April by which the purchase-money was loaded, it can in no way be said that this promotion money to the directors was paid by the company. That was felt by the pleader, because it was alleged in the statement of claim that there was a bargain antecedent to the contract of the 19th of April, by which the real purchase-money being £28,500 it was loaded and increased to £32,500, so that there was £4000 never intended to belong to the vendors, but was merely put in so that it might be paid out of funds of the company to them, in order that they might hand it back to the directors. That case is disproved, and that being so, it is impossible to say that this statement is deceitful or wrong.

We now come to the other part of the case. It is said that this £4000 was paid to the directors (I omit the fact that it was paid partly to the solicitors) for their services past or future, or past and future as directors, and that that falsifies the statement in the prospectus that "The remuneration of the directors shall be fixed by the shareholders, and it is proposed that they shall be paid only by a commission on the profits made." In my opinion those words refer to this, that under the articles there was not a fixed sum to be paid to the directors for their services, but it was to be determined by a general meeting what they should have. It is said it is "proposed" they shall be paid only by a commission on the profits made. "Only," in my opinion, refers to what was to be proposed to the general meeting, and does not negative the fact that they might get from the vendors, or from somebody else, some remuneration for agreeing to become directors. Mr. Justice *Fry*, as I understand his judgment, relied much on the word "proposed." He said that there was at least a proposal before the prospectus was issued that the directors should receive this sum from the vendors. If I am right in my construction of the prospectus, any argument founded on the word "proposed" falls to the ground, because I hold that there is no statement that nothing shall be paid to the directors by anybody, but only a statement that the company were not bound by the articles to give the directors a fixed sum, but that their remuneration was to be left to the shareholders in meeting assembled, and that the proposal which would be brought before them would be that a commission on profits only should be paid them by the company, so as to make their remuneration depend on the success of the company.

I have dealt with that point in order to shew that, in my opinion, there is no ground for reliance on that part of the prospectus as maintaining this action; but I ought to add that in an action of deceit the Plaintiff cannot establish a title to relief simply by shewing that the Defendants have made a fraudulent statement: he must also shew that he was deceived by the statement, and acted upon it to his prejudice. But in this case, although the Plaintiff knew from the defence how the Defendants put their case, and probably knew it from what had taken place previously, he does not in his pleading allege that, even according to the Defendant's own case, the statement of the prospectus as to the remuneration of the directors was false. I should be reluctant to decide the case on the ground of pleading, but the Plaintiff does not carry the case further in his evidence. All he says is this: "I saw that there was no promotion money to be paid, and I saw Mr. *Grimes*' name, whom I knew as a retired paper-maker, and I thought he would know if it was a profitable concern." Therefore he does not allege that he relied on the prospectus as saying, "The directors shall get nothing from anybody except what they get from the shareholders, and that shall be a commission only on the profits." In my opinion it would not be right in an action of deceit to give a plaintiff relief on the ground that a particular statement, according to the construction put on it by the Court, is false, when the plaintiff does not venture to swear that he understood the statement in the sense which the Court puts on it. If

20 Ch D 73.

he did not, then, even if that construction may have been falsified by the facts, he was not deceived. Therefore, on that ground alone I should have been prepared to dispose of this action, but I thought it better to go through the statements in the prospectus, and to shew that, in my opinion, there was no ground for the construction put upon them by the learned Judge in the Court below.

In this case there are two other points of importance upon which I give no judgment, viz., how far the Plaintiff could have obtained any relief if the statement in the prospectus had, to the knowledge of the directors, become untrue before the contract had been completed, or how far there is sufficient evidence of damage to entitle the Plaintiff, if otherwise the Court were in his favour, to any relief. On these points I give no opinion, but I must not be considered as acceding to the view that the coming into existence of a fact which would have made a statement in the prospectus untrue if it had existed at the time of issuing the prospectus, would, in an action of deceit, entitle the Plaintiff to relief. That is a matter to be considered when it arises.

LUSH, L.J. :—

I am of opinion that the learned Judge in the Court below allowed his mind to be diverted from the real question at issue in this case, which lies, as it appears to me, in a very small compass.

The Plaintiff complains that he was deceived by false statements in a prospectus into taking shares in this company. The prospectus stated that the property had been purchased for £32,500, that the capital of the company was to be £32,500 divided into 6500 shares of £5 each, that the vendors had agreed to take 3000 shares out of the 6500 as paid-up shares, in part payment of their purchase-money, and that the remaining 3500 shares only were to be issued to the public. It also stated that the vendors had agreed to allow a large part of the purchase-money to remain on mortgage for a given time, and then it stated what the Plaintiff says deceived him. The statement is this: "The remuneration of the directors will be fixed by the shareholders, and it is proposed that they shall be paid only by a commission on the profits made, no promotion money whatever being paid to them by the company, and all formation expenses being paid by the vendors." To my mind there is no doubt what the meaning of that statement is. It tells those whom the prospectus invites to become shareholders that their capital will not be expended in promotion money, but that it will be all applied to the purposes of the business; it tells them that the directors will not be entitled to any fixed salary for what they do, but that they will only be paid such a sum as the shareholders choose to award to them, and it tells them that the directors intend to propose to the shareholders, when they meet them at a general meeting, that the payment shall be by a commission on the profits made and by nothing else. Is, then, that statement true?

First of all as to the remuneration being fixed by the shareholders. The statement is perfectly true, because it is only a statement of a provision contained in the articles of association, that "the directors shall be entitled to set aside and appropriate for their remuneration such sums as shall be resolved upon by the shareholders at their first or some subsequent meeting, with power from time to time to vary the amount." There is no fixed sum to be paid to them, but the shareholders themselves are to determine what the directors are to have, and the directors say, "We intend to propose to the shareholders that the directors shall be paid by commission only," which of course would give the directors a direct interest in making the concern a profitable one. I confess it surprises me that any one should have read that prospectus in any other sense.

Then, taking up the subject to which Lord Justice *Cotton* has adverted, it must be remembered that the Plaintiff does not say in his evidence that he understood the prospectus in any different sense; but the case he makes is this—he says, "That prospectus deceived me, and in this way: it states that £32,500 was paid for the property, whereas, in fact, the purchase-money of the property was only £28,500—that is all the vendors meant to ask for the property—and by collusion between them and the directors who negotiated for the purchase on behalf of the intended company it was arranged that £4000 should be added to that purchase-money in order that it might be distributed among the directors; so that the company had in fact to pay £4000 for promotion money." That is the whole of the case made by the statement of claim, and the action is based on that allegation.

Now, it is agreed on all hands, and the learned Judge below finds, that there is no evidence of any bargain having been made before the contract for the sale of this estate that any sum should be added to the purchase-money. To my mind the contrary is proved, for it appears that the vendors of the estate had refused £30,000 from another purchaser, and when these parties came to negotiate for the estate in order to get up a joint stock company, the vendors asked £35,000. Those who were buying on behalf of the company offered £30,000, which was refused, and the parties ultimately agreed to split the difference, and to make the purchase-money £32,500. Therefore the statement that £28,500 was the real purchase-money is entirely falsified, and the learned Judge so finds. That, I think, disposes of the action, because the action is based on the allegation that there was a collusive bargain made between the sellers and the buyers on behalf of the company that £4000 should be added to the purchase-money, so as only colourably to form part of the purchase-money but really to be promotion money. To my mind there was an end of the case as soon as that was disproved.

The case, however, proceeded, and it appears that the sellers, who were two of the directors, did, after the allotment to them of 3000 shares as part of their purchase-money, transfer 800 of those shares to be distributed in certain proportions among the directors and the solicitors—175 to Mr. *Flitcroft*, who bargained for the purchase, 150 to another director, Mr. *Grimes*, fifty more to two other directors, twenty-five to another, and 175 to each of the solicitors in payment of their costs. I quite agree with Lord Justice *James* that it was not an improbable or unreasonable thing for the sellers of the estate to do, when we consider that they were owners of very nearly half the shares in the company; that a large part of the purchase-money remained on mortgage of the estate; that they themselves did not feel confident that they were able to carry on the concern at a profit; that Mr. *Grimes* and Mr. *Flitcroft* were well known in the paper trade, one of them being in a large business on his own account and the other having carried on a large business successfully and retired. Having regard to these circumstances, it strikes me as a very reasonable thing that the vendors should have thought it worth their while to pay such a consideration in order to secure the services of two such men, who had a large connection among paper consumers, for the purpose of inducing them to give their best services in making this concern profitable. As I have said, the vendors were the holders of nearly half the number of shares, and the value of their shares would entirely, and the value of their mortgage would to a great extent, depend on the prosperity of the concern. However, passing that by, the fact is that 800 shares out of the 3000 which the vendors received were distributed, in the proportions I have mentioned, among the directors and solicitors. One of the vendors stated in evidence that that was in order to engage the future services of these gentlemen as directors. The learned Judge disbelieved that. I quite agree with the rest of the Court that we ought not to dissent from that conclusion, because we have not the same advantage that the learned Judge had who saw the witnesses and heard the manner in which they gave their evidence. His Lordship inferred that the 800 shares must have been given for services connected with the promotion of the company. Be it so; it remains as a fact that this remuneration was not agreed to be given before the contract for the sale of the estate, and therefore it did not influence the purchase-money; and if it was given before the 6th of May it was not given earlier than the 23rd of April, when the prospectus came out. Suppose it was given, or agreed to be given, on the 23rd of April as a remuneration for the services the Defendants had rendered in getting up the concern, that does not prove the charge in this statement of claim, because the charge is that what they received was agreed beforehand to be added to the purchase-money, in order that the promotion money should come out of the company's funds instead of out of the funds of the vendors. That allegation being disproved, it does not seem to me to be material when the agreement was made or what it was for. The action is an action for false and fraudulent misrepresentation, and, in order to prove that, the party complaining must shew that there were false statements in the prospectus, and that by reason of those false statements he was

C. A.
1881
ARKWRIGHT
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induced to take the shares. I come to the conclusion, as I have said, that the statements in the prospectus complained of are true, and in my opinion the Plaintiff's case wholly fails.

A great many considerations have been let in and presented in argument which have no relation at all to the issue raised in this action. Acts were done which were not right, but they do not support the case made by the Plaintiff.

JAMES, L.J. :—

I think it right to add that I entirely agree with what Lord Justice *Cotton* has said, that we cannot accede to the suggestion made by the counsel for the Respondent, that the persons issuing a prospectus are liable to an action of deceit because they do not mention a fact coming to their knowledge before the allotment of shares which falsifies a statement in the prospectus.

Solicitors for Plaintiff: *Clarke, Woodcock, & Ryland.*
Solicitors for Defendants: *Phelps, Sidgwick, & Biddle.*

H. C. J.

In re BAREHAM.

C. A.
1881
March 30.

24 ClD 57

Lands Clauses Act, 1845, s. 80—*Costs occasioned by Litigation between adverse Claimants.*

Property which was in the possession of a mortgagee was taken by the *London* School Board, and the purchase-money paid into Court pursuant to the *Lands Clauses Act*, 1845. The mortgagor's trustee in liquidation presented a petition asking for an inquiry what was due on the mortgage, for payment to the mortgagee of what should be so found due, and for payment of the residue of the purchase-money to himself:—

Held (reversing the decision of *Fry*, J.), that the Board must pay the costs of the inquiry.

IN 1878 the School Board for *London* took, under their statutory powers, certain leasehold property which had in 1862 been mortgaged by *Daniel Bareham* to *J. Walters* and *A. Walters*, to secure £1050 and interest, and of which the mortgagees then were in possession. The mortgagor had, in 1871, filed a petition for liquidation, and *Richard Jones* was trustee in the liquidation. The purchase-money was on the 30th of April, 1878, assessed by the verdict of a jury at £1990, and was paid into Court pursuant to the *Lands Clauses Consolidation Act*, 1845.

On the 20th of July, 1878, an order was made on the petition of the Board that the purchase-money, with interest from the day when the Board took possession, should be carried over to an account, "*Ex parte* the School Board for *London*, *A. Walters* and *James Walters* as mortgagees, and *Richard Jones* as trustee of *Daniel Bareham*, a bankrupt, the persons interested in the leases of 10, 12, &c., *Buckingham Mews*, *Bayswater*."

Jones shortly afterwards presented a petition asking that an account might be taken of what was due to the mortgagees, that out of the purchase-money what was found due to the mortgagees might be paid to them, and the residue paid to the Petitioner. This petition was not served on the Board. On the 6th of August, 1878, the petition was referred to Chambers to take the account, and the further hearing was adjourned.

The account having been taken, the petition came on again in July, 1880. The petition, by leave of the Court, was amended by asking that the Board might be ordered to pay costs according to the Act, and stood over to serve them. On the 30th of July, 1880, an order was made for payment to the mortgagees of what had been found due to them, and on the 6th of August, 1880, an order was made for taxation of the costs of the Petitioner and the mortgagees, including therein all reasonable charges and expenses of obtaining that order, and of all proceedings relating thereto, and the Taxing Master was to distinguish so much of the costs of the said Respondents, if any, as were not payable by the School Board. It was ordered that the costs so distinguished should be paid out of the fund which remained in Court after the payment directed by the order of the 30th of July, and that the residue of the fund should be paid to *Jones* as trustee of *Bareham*, and that the School Board should pay to the Petitioner the residue of his costs.

The Taxing Master disallowed, as against the Board, all the costs, both of the Petitioner and the mortgagees, of taking the account of what was due on the mortgage, such costs amounting altogether to £101 18*s.* 11*d.* Objections were taken to his certificate, which he overruled, giving the following reasons for his conclusion :—

"The items which I disallowed on the taxation consist of costs and expenses of and incidental to the investigation before the Judge in Chambers of the accounts of the mortgagees in possession of the property taken by the School Board, including costs of an abandoned appeal to the Judge, of obtaining several vouchers lost by the mortgagee, and of a dispute between the mortgagor and mortgagee as to the mode of taxing the mortgagees' costs. I was of opinion that these costs were not directly or indirectly occasioned by any act of the School Board; the mortgagor did not require from the mortgagee an account because his property had been taken by the School Board, nor were the items of the account in any way affected by the action of the Board; the Board were not made Respondents to the petition until after the accounts had been taken, and had no notice of the proceedings in the Judge's Chambers; the mortgagor and mortgagee might have agreed on the proportions in which the fund in Court was to be divided, and then the expense of taking the accounts in the Judges Chambers would have been entirely avoided; they did not agree, and were able to take advantage of their being before the Court on the matter of the petition, to take an immediate reference to the Judge in Chambers to decide their disputes as to the accounts, and so were saved the expense of originating proceedings for taking the accounts. I have considered the several reported cases, and have been unable to find any case where the circumstances were the same as in this, but I came to the conclusion that the decisions are all based on the principle that only those costs which have been occasioned by the acts of the company or other body exercising their powers of taking land ought to be paid by the company or other body, and that the costs in question were not occasioned by any act of the School Board, and therefore ought not to be paid by them, and I accordingly disallowed them. I have considered the objections, and I am still of the same opinion, and I disallow the objections."

The Petitioner then took out a summons to vary the taxation.

Fry, J., sitting in Chambers for Vice-Chancellor *Malins*, agreed with the Taxing Master and dismissed the summons.

The Petitioner appealed.

Glasse, Q.C., and *Chadwyck Healey*, for the appeal:—

The rule of the Court as to what is litigation between adverse claimants is laid down by *Jessel*, M.R., in *Askew* v. *Woodhead* (1), in accordance with *Re Singleton's Estate* (2), *In re Spooner's Estate* (3), and many other authorities. According to that rule these costs must be paid by the Board.

J. Pearson, Q.C., and *Kirby*, for the Board:—

This is not a case like *Askew* v. *Woodhead*, where the contest never would have arisen if the company had not taken the land.

[JESSEL, M.R.:—Suppose a trust to sell land after the death of a tenant for life, and to divide among a class. A company takes the land, and the money comes into Court. A class inquiry is needed to distribute it. Is it not the settled practice that the company pays the costs of the inquiry?]

The opinions of the Taxing Master and of Mr. Justice *Fry* are supported by *Re Cant's Estate* (4).

[COTTON, L.J., referred to *Eden* v. *Thompson* (5).]

All proceedings requisite to settle a dispute which would have arisen whether the land was taken by the company or not, are costs which the company cannot in justice be called on to pay, and ought to be regarded as litigation between adverse claimants.

JESSEL, M.R.:—

This appeal from Mr. Justice *Fry* raises a question which I considered to have been long ago settled. The case is simply this: The purchase-money payable for property taken by the School Board under their statutory powers has been paid into Court pursuant to the *Lands Clauses Consolidation Act*, and has to be divided between two persons, the mortgagor and the mortgagee.

(1) 14 Ch. D. 27, 36.

(2) 11 W. R. 871. 9 Jur N.S. 941

(3) 1 K. & J. 220.

(4) 1 D. F. & J. 153. 5 Jur N.S. 153

(5) 2 H. & M. 6.

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In re
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24 Ch D.

There was no dispute as to their relative positions. Nothing was in dispute except the amount due on the mortgage. The ascertaining how much of the fund in Court belongs to one of them and how much to the other is a matter of ordinary administration, and not of litigation properly so called. The Taxing Master seems to have decided, and his decision has been upheld by Mr. Justice *Fry*, that the Board are only liable to pay such costs as have been occasioned by their having taken the land. But the Act says that the costs of the orders for payment out of Court of the moneys, or of the securities on which the same shall be invested, and of all proceedings relating thereto, except such as are occasioned by litigation between adverse claimants, shall be paid by the company; and it is everyday practice to order the company to pay the costs of class inquiries which are necessary for the purpose of distributing the fund. In *Eden* v. *Thompson* (1), Lord *Hatherley* says: "Persons whose estates are taken by railway companies or other such bodies under compulsory powers given to them for their own benefit or the benefit of the parties whom they represent, are entitled to deal with their estates to suit their own convenience, not that of the company; and if it happens in the course of such dealing that a suit is instituted, not being litigation properly so called, but merely administration or some similar proceeding under the direction of the Court, it will follow as of course that the company (except in cases of vexatious or wanton proceedings, of which the Court would take special notice, and with which it would know how to deal when they came before it) would have to pay the costs of all necessary parties occasioned, not by any particular adverse claims, but by the ordinary course of dealing with property. This principle clearly covers the case of a mortgage, and would provide for the payment of all the ordinary costs of mortgagor and mortgagee so long as there was no suit to set aside the mortgage, or other contest of that nature, between the parties." There is here no such adverse litigation as Lord *Hatherley* speaks of, and the appeal must be allowed.

BRETT, L.J.:—

I am of the same opinion, and think that the facts can hardly

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(1) 2 H. & M. 9.

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have been fully brought to the mind of Mr. Justice *Fry*, for a series of cases must be overruled before his decision can be supported.

COTTON, L.J.:—

I am of the same opinion.

Solicitor for Appellant: *R. B. Jones.*
Solicitors for the Board: *Gedge & Co.*

H. C. J.

C. A.
1881
May 5.

Ex parte FINDLAY. *In re* COLLIE.

Proof in Bankruptcy—Interest after Adjudication—Joint and Separate Estates.

A creditor whose proof is admitted against both the separate estates of two bankrupts who have been partners is not entitled to receive any dividend in respect of interest accrued on his debt subsequently to the date of the adjudication, until the joint creditors have been paid the principal of their debts in full.

Warrant Finance Company's Case (1), and *Warrant Finance Company's Case* (No. 2) (2) distinguished.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

Alexander Collie and *William Collie*, who traded in partnership as merchants, in *London* and at *Manchester*, were on the 19th of August, 1875, adjudicated bankrupts. On the 26th of July, 1876, a proof for £5000 tendered by *T. D. Findlay & Co.*, of *Glasgow*, was admitted by Mr. Registrar *Murray* against the separate estates of both the bankrupts, as well as against their joint estate, with a proviso that *Findlay & Co.* were not to be entitled to receive dividends from both the joint and the separate estates, but that, before the receipt of any dividend, they were to elect whether they would receive dividends from the joint estate or from the separate estates. The claim of *Findlay & Co.* was in respect of a fraud committed by the bankrupts, and the proof was admitted in this form on the authority of *Ex parte Adamson* (3).

(1) Law Rep. 5 Ch. 86.
(2) Law Rep. 5 Ch. 88.
(3) 8 Ch. D. 807.

On the 22nd of February, 1877, *Findlay & Co.* elected to receive dividends from the separate estates, and on the 23rd of February, 1877, they received a dividend of 5*s.* in the pound from each of the separate estates, these dividends having been declared on the 9th of May, 1876. On the 19th of June, 1880, the trustee declared a second and final dividend of 9*s.* 3*d.* in the pound on the separate estate of *Alexander Collie,* and a second and final dividend of 7*s.* 11*d.* in the pound on the separate estate of *William Collie,* and on the 5th of July, 1880, the trustee, out of these dividends, paid *Findlay & Co.* 5*s.* in the pound from each separate estate. They had thus received 20*s.* in the pound on their debt. They then claimed to be entitled to receive further dividends from both separate estates until they had received interest on their debt up to the time when it was finally paid. Mr. Registrar *Hazlitt* held that they were not entitled to receive any interest for the period subsequent to the adjudication, until the joint creditors of the bankrupts had received 20*s.* in the pound. *Findlay & Co.* appealed.

Stirling, for the Appellants:—

There being two proofs on the two separate estates, each is a separate security, and the ordinary rule that there can be no interest after the date of adjudication so long as the joint creditors have not been paid in full does not apply: *Warrant Finance Company's Case* (1); *Warrant Finance Company's Case* (No. 2) (2).

[JAMES, L.J.:—In the first of those cases there were two distinct winding-up proceedings, and the creditor applied his security in payment of interest.]

So in the present case, the Appellants are entitled to the benefit of each proof independently of the other, and may apply it as they please till their debt, principal and interest, is extinguished.

Winslow, Q.C., and *J. E. Linklater,* for the trustee, were not heard.

JAMES, L.J.:—

There is really no authority for this application, and all principle is against it. In bankruptcy there is only one administration of joint and separate estates, though for convenience of administration the creditors are divided into two classes. And the rule is clear, that when a creditor is competing with the other creditors he cannot prove for interest accrued due after the adjudication. Of course, if he has a security for his debt, the case is different. But, in the absence of any security, a creditor cannot get interest on his debt accrued subsequently to the adjudication until the creditors, joint and separate, have been satisfied the principal of their debts. The certificate of the official assignee in bankruptcy which was referred to in *Warrant Finance Company's Case* (1) related to the practice in bankruptcy in the case of two distinct bankruptcies.

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(1) Law Rep. 5 Ch. 86.

(2) Law Rep. 5 Ch. 88.

BAGGALLAY and LUSH, L.JJ., concurred.

Winslow:—That certificate is inconsistent with the decisions in *Ex parte Paton* (2) and *Ex parte Gass* (3).

JAMES, L.J.:—It seems to be so, but the point is not before us for decision now.

Solicitors for Appellants: *Murray, Hutchins, & Stirling.*
Solicitors for Trustee: *Travers Smith & Braithwaite.*

(1) Law Rep. 5 Ch. 86.
(2) 1 Gly. & J. 332.
(3) 1 Gly. & J. 338, n.

W. L. C.

In re NORTHERN COUNTIES OF ENGLAND FIRE INSURANCE COMPANY.

MACFARLANE'S CLAIM.

M. R.
1880
Dec. 9.

Post 345
18 Ch D 648.

17 Ch D 4
20 Ch D 35
9 QBD 6

Limited Company — Winding-up — Fire Insurance — Fires before and after Winding-up Order—Right of Proof—Companies Act, 1862, *s.* 158—*Gen. Ord. November*, 1862, *r.* 25—*Bankruptcy Act*, 1869, *s.* 31—*Bankruptcy Rules*, 1870, *r.* 67—*Judicature Act*, 1875, *s.* 10.

The holder of a fire policy issued by a fire insurance company is entitled, upon the company being ordered to be wound up, to prove in the winding-up for the full amount of loss covered by the policy and sustained by him through a fire which has occurred in the course of the winding-up although after the date of the winding-up order, and whether the time limited for sending in claims in the winding-up has expired or not.

A fortiori, a claim on account of a fire which has occurred after the presentation of the petition but before the order to wind up, is entitled to proof.

ADJOURNED SUMMONS.

This was a representative case, the question being whether the holder of a fire policy issued by a fire insurance company was, upon the company being wound up, entitled to prove for the full amount of loss covered by the policy and sustained by him through a fire which occurred in the course of the winding-up but after the date of the winding-up order.

The facts were as follows:—

One *Macfarlane* held a policy of fire insurance of the *Northern Counties of England Fire Insurance Company, Limited*, dated the 8th of May, 1878, for the sum of £500, upon certain buildings in the town of *Paisley*.

On the 26th of November, 1879, a petition was presented for winding up the company, and a winding-up order was made on the 13th of December, 1879.

On the 22nd of January, 1880, after the winding-up order and before the expiration of the time limited for sending in claims, the premises insured were burnt down, and *Macfarlane* thereby sustained loss to the full amount of the policy. The buildings were not insured in any other office than that of the company.

Macfarlane was not aware of the winding-up order until after the fire. He took out this summons to be allowed to prove in the winding-up for £500, the full amount of his policy. The Chief Clerk, however, held that he could only prove for the amount of premium for which he might have re-insured the property at the date of the winding-up order, as being the only mode of estimating the contingency.

The summons was then adjourned into Court.

Chitty, Q.C., and *Norton*, for *Macfarlane*:—

At the date of the winding-up order this was "a debt payable on a contingency," or a "contingent claim" against the company and therefore provable under sect. 158 of the *Companies Act*, 1862, according to a valuation pursuant to that section and Gen. Ord. November, 1862, rule 25: *In re Trent and Humber Company* (1). But this contingency ripened into an actual debt during the winding-up; and inasmuch as your Lordship has held that under the 10th section of the *Judicature Act*, 1875, all the rules in bankruptcy "as to debts and liabilities provable and as to the valuation of contingent liabilities" shall apply in the winding-up of a company: *In re Printing and Numerical Registering Company* (2); we ask your Lordship to apply in the present case the rule in bankruptcy: *Bankruptcy Act*, 1869, s. 31; that all contingent debts and liabilities to which the bankrupt is subject at the date of the order of adjudication (equivalent to the order to wind up), or to which he may become subject during the continuance of the bankruptcy (corresponding to the continuance of the winding-up) by reason of any obligation incurred previously to the order of adjudication, shall be deemed to be debts provable in the bankruptcy.

[*Macnaghten*, Q.C., *amicus Curiæ*, mentioned *In re Withernsea Brickworks* (3), in which the Court of Appeal appeared to have held that the 10th section of the *Judicature Act*, 1875, was not to be construed as making all the rules in bankruptcy applicable in a winding-up.]

(1) Law Rep. 6 Eq. 396, 400; Ibid. 4 Ch. 112.

(2) 8 Ch. D. 535.

(3) 16 Ch. D. 337.

Davey, Q.C., and *Oswald*, for the liquidator:—

The rule in bankruptcy does not apply to a case of this kind, for the debt must be one as to which the creditor can make an affidavit that the bankrupt was indebted "at the date of the order of adjudication": Bankruptcy Rules, 1870, rule 67, Sched. Form 32. Here the company was not indebted at the date of the winding-up order. The 158th section of the *Companies Act*, 1862, and rule 25 of Gen. Ord. November, 1862, provide for the valuation of all such debts or claims as are subject to any contingency; so that the utmost the present claimant is entitled to is the value of his claim at the date of the order. What he should have done was to have effected a new insurance after the company went into liquidation, following the usual practice in marine insurance. If it is a case for valuation, then the mode of valuation should by analogy follow the practice in the case of a claim under a life policy, as laid down by the *Life Assurance Companies Act*, 1872, s. 5, and the first schedule to the Act, which adopted the method approved of in *Lancaster's Case* (1) and *Wallberg's Case* (2); or the mode of valuing a claim under a covenant for life assurance: *Ex parte Jackson* (3); *In re Miller* (4).

Chitty:—The latter case was questioned in *Ex parte Bates* (5).

JESSEL, M.R.:—

I have no doubt about this case. In the first place, not having seen the judgment in the case to which Mr. *Macnaghten* has referred, I am of course in ignorance of it; but it does appear to me, until I am better instructed, that the meaning of the 10th section of the *Judicature Act*, 1875, is to make one law for proofs in bankruptcy and winding-up, when in either case the estate is insolvent, and that it was intended that all the rules in bankruptcy, whatever they were, should apply to a winding-up. In that respect I entirely concur in the argument of the counsel for the applicant. But I cannot say that the words in the section are perfectly clear to my mind. All that I now feel or ever did feel inclined to say, as I believe I said both in the case of the *Albion Steel and Wire Company* (1) and in that of the *Printing and Numerical Registering Company* (2), is, that the proper meaning of the section appears to me to be this, that as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, the same law is to prevail in winding-up as in bankruptcy. The only question then is, what is the law in bankruptcy. I should think the law in bankruptcy as to contingent liabilities was pretty plain, and that any liability contingent at the date of the adjudication which ripens into a debt during the bankruptcy is provable, according to the provisions of the 31st section of the *Bankruptcy Act*, 1869. The only argument I have heard against this view is this, that the liability must be provable according to the rules in bankruptcy, and where a creditor desires to prove for debt the rules require him to swear to his debt by an affidavit in a prescribed form, which says that the bankrupt was indebted to him in the amount of the debt at the time of the adjudication: Bankruptcy Rules, 1870, rule 67, Sched., Form 32. But if that were to prevent him putting in an affidavit in any other form the result would be singular, because the creditor, being entitled to prove under the 31st section for a contingent liability, could not swear that the bankrupt was indebted to him at the date of adjudication on a contingent liability which had to be valued. It would not be true; and the result would be, therefore, that either the creditor must swear that which was not true, or the form of the affidavit must be altered; and I take it that the latter is the proper thing to do. However that might be, the mere effect of the form of affidavit not fitting the case of course would not cut down the plain words of the enactment, which is not confined to a debt due at the period of adjudication, but extends in express terms to any liability existing at the time of adjudication and which ripens into a debt during the bankruptcy. Now substitute winding-up for bankruptcy, which I suppose you must do, and take the case of a fire occurring after the winding-up order, which is to be considered as equivalent to the adjudication, a claim under the policy made before the close of the winding-up, whether the period for sending in claims has expired or not, would be provable; but of course this would not disturb previous dividends.

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(1) Law Rep. 14 Eq. 72, n.

(2) Eur. Arb. Reil. 65.

(3) 27 L. T. (N.S.) 696.

(4) 6 Ch. D. 790.

(5) 11 Ch. D. 914.

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(1) 7 Ch. D. 547.

(2) 8 Ch. D. 535.

If, therefore, this case depended on the law of bankruptcy, I should be of opinion that the claimant was entitled to prove for the full amount of the damage caused by the fire. The difficulties in the way of the contrary view are something extraordinary. In the first place, there is no debt due at the time of adjudication. No doubt a man with whom a contract has been entered into may, in certain cases, treat a declaration of insolvency or an adjudication in bankruptcy of the other party to the contract as a refusal to perform the contract, and may, at his election, treat it as a breach of contract; but that is by election, and the claimant in this case never made any, so that there would be no debt at all according to that argument. It appears to me that that is unanswerable.

Then, if the case depended on the *Companies Act*, 1862, I should come to the same conclusion. The 158th section of the Act does not appear to me to be directed to the proof of an ordinary debt actually due: that seems to be assumed by the 107th and other sections of the Act to be provable without any express direction; and the 158th section is evidently framed with a view of extending the right of proof to debts which would not otherwise be provable. The 25th rule of the Gen. Ord. of Nov. 1862 is limited to the proofs admissible under the 158th section, that is, to a certain class of proofs not otherwise admissible. So that it appears to me that if this were a debt which without the 158th section would not be provable, it is provable in the winding-up under that section. I may then make a further observation, that even if that were not the true view of the Act, I think the view of the 25th rule taken in the case to which I have been referred, of *In re Trent and Humber Company* (1), would lead me to the same conclusion, for the Lord Chancellor (Lord *Cairns*) obviously thinks there that if, before the time of the proof, the contingency has happened, so that the debt is exactly ascertained, it may still be proved; that is to say, the rule is not wanted, because the amount of the debt can be ascertained without it.

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(1) Law Rep. 4 Ch. 112.

M. R.
1880
In re NORTHERN COUNTIES OF ENGLAND FIRE INSURANCE COMPANY.
MACFARLANE'S CLAIM.

In every way it appears to me that this is a claim provable in the winding-up, and that it ought to have been admitted.

There will therefore be a declaration that Mr. *Macfarlane* is entitled to prove for the full amount of £500.

In another test case in the same liquidation a claim was made on account of a fire which had occurred after the presentation of the petition but before the date of the winding-up order.

Grosvenor Woods, for the claimant.

Davey, Q.C., and *Oswald*, for the liquidator.

JESSEL, M.R. :—The point is not arguable: the claim is clearly provable.

Solicitors: *Gatliff & Howse; A. Wells; Clarke, Rawlins, & Clarke.*

G. I. F. C.

M. R.
1881
May 14.

In re BRIDGES.
HILL *v.* BRIDGES.

[1879 B. 339.]

Administration—Insolvent Estate—Covenant to pay on certain Event—Annuity—Valuation—Contingent Liabilities—Contingency happening during Administration—Proof of Debts—Rebate of Interest—Judicature Act, 1875, s. 10—*Bankruptcy Act*, 1869, s. 31—*Bankruptcy Rules*, 1870, r. 77.

19 Ch D 63
20 Ch D 352

A testator covenanted by deed for payment to his daughter of a sum of £5000, with interest at 4 per cent. per annum, within one month after the death of his wife: also for payment to his daughter of an annuity of £100 during the joint lives of himself and his wife and the life of the survivor, if his daughter should so long live.

The testator died in 1879, insolvent, leaving his widow and daughter surviving, and a judgment was made, in a creditor's action, for administration of his estate.

The daughter having sent in claims in respect of the principal sum and the annuity, they were both allowed on a valuation as at the date of the judgment, but subsequently the widow died. No certificate had yet been made in the action :—

Held, applying the rules in bankruptcy as to contingent liabilities (*Judi-

cature Act, 1875, s. 10), that the daughter was entitled to prove for the full amount of the £5000, less a rebate of interest at 4 per cent. per annum for the period between the date of the judgment and the death of the widow, and that her proof in respect of the annuity must be treated on the same principle.

M. R.
1881
In re BRIDGES.
HILL *v.* BRIDGES.

ADJOURNED SUMMONS.

By the settlement dated the 18th of August, 1853, made upon the marriage of *Emma Bridges* with *Thomas James Longworth*, *Thomas Charles Bridges* (the father of the said *Emma Bridges*), covenanted with trustees that he, his executors, administrators, or assigns would, during the joint lives of himself and his wife, *Emma Bridges*, and the life of the survivor, if the said *T. J. Longworth* and *Emma Bridges* (the daughter), or either of them, should so long live, pay to the trustees an annuity of £100: also that he the said *T. C. Bridges*, his heirs, executors, or administrators, would, within one calendar month after the death of the said *Emma Bridges* his wife, pay to the trustees the sum of £5000, with interest at the rate of 4 per cent. per annum from such death up to the day of payment. The settlement then proceeded to declare trusts of the said annuity of £100 and principal sum of £5000.

Mrs. *Longworth* survived her husband, *T. J. Longworth*, and married a Mr. *Hill*, whom she also survived.

Thomas Charles Bridges, the covenantor, died in January, 1879, leaving his widow, *Emma Bridges*, surviving him.

At the date of her father's death, Mrs. *Hill* had become absolutely entitled under the trusts of the annuity of £100 and of the principal sum of £5000. There was also a sum due to her for arrears of the annuity.

The estate of *Thomas Charles Bridges*, the covenantor, being insolvent, this action for administration was instituted by Mrs. *Hill*, on behalf of herself and his other unsatisfied creditors, against the executors of his will, and the usual administration judgment was made on the 21st of July, 1879.

Mrs. *Hill* having sent in a claim for the full amount of the £5000, and also for the arrears of the annuity, and to have the annuity valued, the Chief Clerk directed both the principal sum and the annuity to be valued by an actuary as on the 21st of July, 1879, the date of the judgment. The actuary thereupon assessed the value of the £5000 at £3872, and of the annuity at £518. These valuations were adopted by the Chief Clerk, who accordingly allowed Mrs. *Hill's* claims at those amounts, as also her claim for the arrears of the annuity.

On the 16th of March, 1881, since these claims had been dealt with by the Chief Clerk, the testator's widow, *Emma Bridges*, died.

No certificate had yet been made by the Chief Clerk under the judgment.

The question now was, whether, in consequence of the death of the testator's widow during the proceedings upon the inquiries under the judgment, the £5000 covenanted by the testator to be paid at her death should be admitted in full against his estate, instead of the value ascertained by the actuary: also whether the value of the annuity, as ascertained by the actuary, should be admitted, seeing that the period during which it was covenanted to be paid had expired.

Chitty, Q.C., and *Cozens Hardy*, for Mrs. *Hill*:—

This being the administration of an insolvent estate, the rules in bankruptcy as to contingent liabilities provable, are to apply, under sect. 10 of the *Judicature Act*, 1875: and the rule in bankruptcy, under sect. 31 of the *Bankruptcy Act*, 1869, is that "all debts and liabilities, present or future, certain or contingent, to which the bankrupt is subject at the date of the order of adjudication"—corresponding to the judgment for administration: *In re Summers* (1)—"or to which he may become subject during the continuance of the bankruptcy"—corresponding to the continuance of the administration of the estate of the insolvent—"by reason of any obligation incurred previously to the date of the order of adjudication, shall be deemed to be debts provable in bankruptcy, and may be proved in the prescribed manner." It is singular that neither the present *Bankruptcy Act*, nor the General Rules in Bankruptcy, contain any directions for the valuation of contingent debts, though under the 177th section of the old Bankruptcy Act, 1849, if a contingency happened during the bankruptcy, proof for the full amount of the debt was allowed.

(1) 13 Ch. D. 136.

We submit, however, that as regards the £5000, the liability under the covenant having ripened into an actual debt during the administration proceedings, and especially before certificate, the sum should be admitted in full, upon the principle of your Lordship's decision in *Macfarlane's Claim* (1).

Apparently, the proper course is for the claimant now to bring in a fresh proof for the actual debt, a rebate of interest being deducted for the interval between the judgment and the widow's death: Bankruptcy Rules, 1870, rule 77. It is to be presumed that the annuity should be treated on the same principle.

Ince, Q.C., and *G. H. Orpen*, for the executors:—

The liabilities should be valued as at the date of the judgment, and the amount of the valuation can alone be proved for. The proof must be made for better or for worse: *Ex parte Bates* (2). Thus, the claimant would get less in respect of the principal sum, but more in respect of the annuity.

JESSEL, M.R.:—

I am of opinion, as regards the £5000, that, upon the principle I adopted in *Macfarlane's Claim*, the contingency having happened before certificate, the claimant is entitled to prove for the full amount, less a rebate or discount at 4 per cent. for the period between the date of the judgment and the widow's death.

The annuity must be treated on the same principle; so that the claimant must prove first for the amount of arrears due at the date of the judgment, and then for the full amount of subsequently accruing payments, less a rebate or discount, as I have stated.

Solicitors: *Abbott, Jenkins, & Co.*; *H. White.*

(1) *Ante*, p. 337.

(2) 11 Ch. D. 914.

G. I. F. C.

M. R.
1881
April 13.

DAUVILLIER *v.* MYERS.

[1879 D. 51.]

Practice—Official Referee—Order for Production of Documents—Jurisdiction—Rules of Court, 1875, *Order xxxi., rr.* 11, 18, 20; *Order xxxvi., r.* 32.

The official referees have no jurisdiction to make an order for the production of documents, the proper course being to take out a summons for the purpose in the Chambers of the Judge to whom the action is attached.

MOTION.

This action had been referred to one of the official referees who during the trial had ordered the Plaintiff to produce certain documents at the office of his solicitor for the Defendant's inspection.

With this order the Plaintiff had not complied, and the Defendant now moved, under Order XXXI., rule 20, of Rules of Court, 1875, to dismiss the action.

Ince, Q.C., and *Grosvenor Woods*, in support of the motion:—

The Court has jurisdiction to stay all proceedings in a cause until the Plaintiff has made any discovery which he is called upon by the order of the Court to make: *Republic of Liberia* v. *Roye* (1); and by Order XXXI., rule 20, of the Rules of Court, if a plaintiff fails to comply with an order for production of documents, he is liable to have his action dismissed for want of prosecution. The Plaintiff has documents in his possession which it is important that we should see, and the official referee made an order for their production.

[JESSEL, M.R.:—Order XXXI., rule 11, provides that the Court or a Judge may order the production of documents, and rule 18 of the same Order provides that every application for an order for inspection of documents shall be to a Judge.]

If the order of the official referee is wrong, we ask that the order for production may be made now, and that if necessary we may have leave to amend our notice of motion.

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(1) 1 App. Cas. 139.

Action subsequently dismissed on an unoff'l affidavit being made W.N. (81) 57.

Roxburgh, Q.C., and *Oswald*, for the Plaintiff:—

The official referee has no jurisdiction to make the order he has done: *Rowcliffe* v. *Leigh* (1); he has, under Order XXXVI., rule 32, only the same authority in the conduct of any reference or trial as a Judge when presiding at any trial before him. The order of the referee is null and void, and this motion entirely fails, and your Lordship will not allow the Plaintiff to amend his notice of motion in the manner asked for now.

JESSEL, M.R.:—

I shall make the order for production as asked for, and shall for that purpose give the Plaintiff leave to amend his notice of motion, though it is not absolutely necessary, as the notice of motion contains the usual clause as to further or other order. The official referee has made a slip; he made a perfectly proper order if he had jurisdiction to make it, but under Order XXXVI., rule 32, the only jurisdiction he has is to make such an order as a Judge of the High Court can make at a trial before him, and the order the official referee has made could not be made at the trial. Orders for the production of documents should always be made in the Chambers of the Judge to whom the action belongs. My Chief Clerk would have made the order as a matter of course.

I shall now make the order that the Plaintiff do produce the documents in question at the office of his solicitor for the Defendant's inspection. The costs of this motion will be costs in the action.

Solicitors: *G. S. & H. Brandon; Crook.*

G. M.

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(1) 4 Ch. D. 661.

M. R.
1881
April 28.

In re WADE & THOMAS, SOLICITORS.

Taxation—Mortgagee—Transferee—Mortgagor—Draft Mortgage or Transfer—Copies.

A firm of solicitors acting for a number of sets of persons (five in all) interested in moneys secured upon mortgage, on the mortgage being paid off, in their bill of costs charged the executors of the mortgagor with the cost of five copies of the draft deed of transfer, and the Taxing Master having disallowed the charge for four such copies:—

Held, that the Taxing Master was right in allowing the costs of only one copy.

A mortgagee or transferee of a mortgage, though entitled to keep a fair copy of the draft deed for his own protection until the transaction is completed, has no right to keep copies of the mortgage deed or deed of transfer after he is paid off, but whatever copies he has are as a general rule copies paid for by the mortgagor, and to be delivered up to him when he pays off the mortgage.

ADJOURNED SUMMONS.

This was a summons which had been adjourned into Court that an objection to the taxation of certain costs might be allowed, and that it might be referred back to the Taxing Master to vary his certificate.

Messrs. *Wade & Thomas* acted as the solicitors for the trustees under the will, and the *cestuis que trust* of *Palin,* the mortgagee, in certain business relating to the transfer of a mortgage of property, the equity of redemption of which belonged to the trustees and executors of the will of one *Neale.*

Palin, the mortgagee, had executed declarations of trust of portions of the mortgage money to four different persons, and in pursuance of an order made in an action for the administration of his estate, notices of the declarations of trust were indorsed on the original mortgage deed. The holders of the several declarations of trust were all made parties to the deed of transfer, and executed the same upon payment to them of the principal and interest due to them respectively on their respective declarations of trust.

The bill of costs sent in by Messrs. *Wade & Thomas* to the solicitors of *Palin's* trustees and the parties interested in the mortgage contained the following items: "Perusing draft transfer four law skins," "Making fair copy to keep for the trustees of Mr. *Palin's* will, 19*s.* 4*d.*," and the same charge for four other fair copies, being one for each of the holders of the declarations of trust who had executed the transfer.

The Taxing Master on taxation disallowed the last four items, and stated in his answer to the objections to the disallowance that he had allowed a copy of the deed of transfer (he had in fact allowed a fair copy of the draft) for the solicitor to keep with his papers; that he did not consider the solicitor was entitled to make a fair copy of the deed for each of the parties executing; and that the allowance of the items would form a precedent in any case of a similar description no matter how numerous the parties might be.

Yate Lee, for *Wade & Thomas*, in support of the summons:—

As solicitors of the *cestuis que trust* we are entitled to make copies of the transfer of mortgage for each of the *cestuis que trust*, who are in fact mortgagees and hold separate securities. They were made parties to the deed of transfer at the instance of the owner of the equity of redemption. They had no desire to be made parties and did not seek to be, but having been made parties, they are entitled for their own protection to have a copy of the deed which they executed as a record of what they signed. The mere fact that they all happened to be represented by the same firm of solicitors makes no difference; at any time any one of them may change his solicitor and then may call upon us for a copy of the deed which he signed. It is the ordinary practice for solicitors to make a fair copy of such a deed for each of the parties executing, and the charge for so doing is allowed on taxation.

The bill as a whole is a most reasonable bill, and the costs chargeable against the other side are much less than they would have been if all the parties had not appeared by the same firm of solicitors. We submit that the charge is a proper one, and ought to be allowed.

Chitty, Q.C., and *Brett*, for *Neale's* trustees, were not called upon.

JESSEL, M.R.:—

What was intended to be asked by the solicitors and to be decided by the Taxing Master, and what was intended by the opponents of the solicitors, it is not for me to say—I have only to decide on the papers before me. I must say in the first instance, and I think it is right to say that considering the number of parties and the complication of the title, it does appear to me that the solicitors' bill was a very moderate one, and I have very little doubt that if it had been carefully framed it might have been made to amount to more than it did without exposing the solicitors to any charge of extortion or unfair and immoderate charges.

But that is not the point I have to decide. The point I have to decide is whether a particular charge which the Taxing Master has disallowed was rightly disallowed. I am prohibited by the rules, and very properly prohibited, from going beyond the bill brought in which has to be taxed. The solicitors cannot add fresh items to it, nor can they set up a claim to something else not claimed by the bill. The bill of costs claims this under the item of December the 3rd. The solicitor having no less than five clients who may be described as mortgagees, or interested in the mortgage money, charges under December the 3rd, "perusing draft transfer four law skins,"—four skins merely meant its length, they were not law skins because then there was no engrossment, as I shall shew presently—"making fair copy to keep" for each one of five clients, 19*s.* 4*d.* The Taxing Master has disallowed four and allowed one. I am clearly of opinion he is right. The solicitor was entitled to make a fair copy of the draft to keep—that is, to keep till the end of the transaction. It is the practice for the solicitor to alter the draft sent and to make a fair copy for his own protection and that of his clients, which is a "fair copy to keep." Of course if he had five clients or fifty he should only make one copy. Therefore the other four were properly disallowed. It is quite clear that is not the engrossment, because the engrossment was not received till the 7th of December, for there is this entry on that day, "Having received engrossment, comparing same with draft, 13*s.* 4*d.*" It appears to me, therefore, the decision of the Master is right and must be affirmed.

But the singularity of the case is this, that the objections are framed on the footing that what had been charged for was not the fair copy draft, but a copy of the deed. There is no such charge in the bill, and therefore no such charge has been allowed. As I have said before, a solicitor is not permitted without special leave to add to his bill, and the objection is that each client was entitled to retain a copy of the transfer he was required to execute. It is a very singular thing that the solicitor had not noticed and was not aware that the charge was made, not for copies of the deed, but for copies of draft transfer. The Taxing Master also seems to have omitted what I should have thought was the essential ground of his decision; he has not looked at the bill to see what he has allowed. Instead of that he answers the solicitor's objection, and says, "I have allowed a copy of the deed of transfer, for the solicitor to keep with his papers." That was a mistake. He had not done anything of the sort. I do not consider he was entitled to make a fair copy of the deed for each of the parties executing. The allowance of these items would form a precedent in any case of a similar description, no matter how numerous the parties might be.

With great respect to the Taxing Master, he ought to have looked at the bill and seen that in what he allowed he had not allowed for any copy of the deed. The question argued does not arise and strictly call for a decision; but as the matter is of great importance, and it has been argued elaborately, I think it right to state that, in my opinion, a mortgagee on being paid off, or the transferee of a mortgage on being paid off, has no right to keep copies of the mortgage deed or deed of transfer, but, on the contrary, whatever copies he has, as a general rule, are copies properly paid for by the mortgagor, and are to be delivered up to him when he pays off the mortgage. This copy draft to keep, for instance, would be very properly paid for by the mortgagor, being a part of the transaction the costs of which he has to pay, but the copy does not belong to the person paid off, but to the mortgagor who pays him off. That is quite plain if you look at what the form of decree is on redemption. I am quoting from page 1035 of the last edition of *Seton*. When he is paid off, the mortgagee is "to deliver up upon oath all deeds and writings in his custody or power relating thereto,"—that is, to the hereditaments—"to the

Defendant," that is, the mortgagor, "or to whom he shall appoint." He is not to keep anything relating to the hereditaments. Of course when he is once fully paid off he has no concern with the title, and is not to keep what Mr. *Yate Lee* calls a record of the title. It is the very thing the mortgagor would most object to; and, in my opinion, he has no right even to make a fair copy at his own expense of the deeds, *à fortiori* none to make a fair copy at the expense of the mortgagor and to keep that fair copy.

If every mortgagee who executes a deed has a right to keep a fair copy of it at the expense of the mortgagor, just see what the expense would be. First of all, in this case there is a fair copy to keep for the trustees of Mr. *Palin's* will. But if the argument is worth anything, each of them must have a copy. The next is "Ditto for the trustees of Miss *Jane Platt*"—there might have been any number of them, two, three, four, or half a dozen, and each one should have a copy. "Ditto for Miss *Elizabeth Platt*." "Ditto for Miss *Menlove*." "Ditto for Miss *S. Masefield* and Mr. *R. Masefield*." Therefore, if the argument is worth anything, in this instance there would be at least eight copies; and there might have been fifteen or twenty, all to be paid for by the unlucky mortgagor. Our law of mortgage is quite oppressive enough without adding to its oppression by sanctioning any such doctrine as this, and I state my opinion that a mortgagee or transferee of a mortgage on being paid off has no right to make a copy of the deed, and still less to make a copy at the expense of the mortgagor and keep it. I think the Taxing Master's reasons would have been unanswerable if he had left out the words "copy of the deed" at the beginning. Under the circumstances I shall refuse the application, and with costs.

Solicitors: *Brownlow & Howe; Chester & Co.*, agents for *Peele & Peele, Shrewsbury*.

G. M.

PATMAN *v.* HARLAND.

[1881 P. 1244.]

M. R.
1881
May 13.

Lessor—Lessee—Restrictive Covenant—Constructive Notice—Lessor's Title—Vendor and Purchaser Act, 1874 (37 & 38 *Vict. c.* 78), *s.* 2, *sub-s.* 1.

A purchaser or lessee having notice of a deed forming part of the chain of title of his vendor or lessor, has constructive notice of the contents of such deed, and is not protected from the consequences of not looking at the deed, even by the most express representation on the part of the vendor or lessor that it contains no restrictive covenants, nor anything in any way affecting the title.

19 Ch D 17
261

The rule that a lessee has constructive notice of his lessor's title has not been altered by sect. 2, sub-sect. 1 of the *Vendor and Purchaser Act*, 1874, but a lessee is now in the same position with regard to notice as if he had, before the Act, stipulated not to inquire into his lessor's title.

Wilson v. *Hart* (1) observed upon.

MOTION.

By an indenture dated the 25th of October, 1876, the Plaintiff conveyed to one *Hervè*, two freehold plots of land, being parts of a building estate at *Wimbledon*, subject, nevertheless, to the restrictions and obligations as to building and other matters contained in an indenture of mutual covenants, also dated the 25th of October, 1876, executed by the Plaintiff and *Hervè*, and the purchasers of other building plots, part of the same estate. One of the covenants contained in the latter deed provided that on the several plots private dwelling-houses only should be erected.

By an indenture dated the 18th of July, 1878, *Hervè* conveyed the same two plots of land to the Defendant *Harland*, subject to the same restrictions and obligations as to building by reference to the deed of mutual covenants, as were contained in the conveyance to *Hervè*.

The Defendant *Harland* having erected a dwelling-house on the property, by an indenture dated the 29th of March, 1881, demised it to the Defendant *Louisa Bennett* for the term of seven years, for the purposes of an "Art College," and the lease contained a proviso that the Defendant *Bennett*, her executors, administrators, or assigns, should be at liberty to erect in the garden belonging to the premises a studio, with necessary rooms connected therewith, of corrugated iron on a brick foundation, and a covenant by the lessee not to carry on any trade, business, or employment, on the premises, without the consent in writing of the lessor, but to use the premises as a private dwelling-house only, with a proviso, however, that the user of the premises for the purpose of a school for instruction in art or otherwise should not be deemed a breach of any covenant in the lease.

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(1) Law Rep. 1 Ch. 463.

Neither the Defendant *Bennett* nor her solicitor was informed or was aware before the execution of the lease, nor till shortly before the issuing of the writ in the action, that there was any restrictive covenant affecting the land, and she had proceeded to erect the studio which was nearly completed.

This was a motion for an injunction to restrain the Defendants from erecting, or continuing to erect, or permitting any building or buildings, other than private dwelling-houses, to remain on the land, and in particular, the building then in the course of erection.

Ince, Q.C., and *Shebbeare*, in support of the motion:—

The erection of the art studio is a clear breach of the covenant. It is not a private dwelling-house in any sense of the word, nor an adjunct to one; it is a separate and distinct building, but the principal question is, whether, under the circumstances, the Defendant *Bennett* is bound by the restrictive covenant as to building, and as to that, we say that she must be taken to have had constructive notice of the restrictive covenant. She was bound to inquire into her lessor's title. It is not necessary that she should have express notice. A lessee has constructive notice of everything affecting his lessor's title: *Fielden* v. *Slater* (1).

Byrne, for the Defendant *Bennett*:—

We had no constructive notice of this restrictive covenant. We had no reason to suspect that any such covenant existed, and the fact that we were not informed of this restrictive covenant when we took the lease, coupled with the fact that a proviso that we might erect the studio was inserted in the lease, amounted to a representation that there was no such restrictive covenant. If there was such a representation, then according to the dictum of Lord Justice *Turner* in *Wilson* v. *Hart* (1), the Court will not enforce the covenant against the Defendant *Bennett.* Having this representation made to her, there was no obligation upon her to make inquiries, and she was not bound to inquire into the landlord's title: *Carter* v. *Williams* (2) and *Jones* v. *Smith* (3) are in our favour.

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(1) Law Rep. 7 Eq. 523.

Crossley, Q.C., and *Simmonds*, for the Defendant *Harland*, submitted that he was not a necessary party to the action, and argued that the studio being erected in the garden of the dwelling-house was within the curtilage, and could fairly be said to be an adjunct to the house, and, therefore, did not fall within the covenant.

JESSEL, M.R.:—

I must say that on the point of law I have a very clear opinion, and not the less so because there are *dicta* in the books which at first sight appear to lead to a different conclusion. I say at first sight, because, when carefully examined, they do not bear out the argument which has been supposed to be fortified by them.

The first question I have to consider is the notice which a man who takes a lease has of his lessor's title. It has been settled for more than a century that he has constructive notice of his lessor's title. Lord *Eldon* treated it as settled law. That means this, that the man who takes a lease is in a similar position as regards constructive notice as a man who buys. There could not be any reason for any distinction between purchasing a fee simple and taking a lease for 10,000 years. If a man who purchases a fee simple is bound to look into the title in a regular way, so is a man who takes a lease for 10,000 years, or 1000 years, or for 100 years, or any lease at all, bound to make reasonable inquiry into his lessor's title. Well, what is reasonable inquiry? It has been held that he is to require the usual title, whatever the usual title may be.

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(1) Law Rep. 1 Ch. 463.

(2) Law Rep. 9 Eq. 678.

(3) 1 Hare, 43; 1 Ph. 244.

In this case the lessor's title began in 1878, and if the lessee had only asked to see the conveyance to the lessor, that is without going back forty years, she would have found that it was subject to this restrictive covenant, because the grantor in 1878 took care to convey the land, subject to the covenants, though the covenants themselves were in a separate deed.

Now it is not to be supposed that I am going to restrict the doctrine to looking at the actual conveyance—not at all—because that would be to destroy it altogether. If the lessor had a conveyance made to him the day before that would not do, the lessee must ask for the conveyance to him and a fair and reasonable deduction of title. In this case, as I said before, the actual conveyance refers to this covenant, but if it had not shewn it, I should have come to the same conclusion, as the conveyance of 1876 referred to it, and that must have appeared on any investigation of title.

The result, therefore, is, the lessee had constructive notice. Now it has been argued that if the lessee, having this constructive notice, was told by the lessor that there was no restrictive covenant, that representation would in equity do away with the effect of constructive notice. I entirely dissent from that proposition. Constructive notice of a deed is constructive notice of its contents, subject to what I am going to say presently. If, therefore, you have notice of a deed relating to the title, and forming part of the chain of title, you have notice of the contents of that deed, and it is no excuse for not asking to look at it to say you were told that the deed contained nothing which it was necessary for you to look at, otherwise in every case you might be satisfied with a statement of the contents of a deed without going to look at it. Of course there may be cases where the deed cannot be got at, or for some other reason, where, with the exercise of all the prudence in the world, you cannot see it, and then there may be no constructive notice affecting the title, but that is another question. Where you know of a deed it is no answer to be told that it does not prejudicially affect the title, as if it does affect the title you are bound by its contents. There is a class of cases, of which I think *Jones* v.

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Smith (1) is the most notorious, where the purchaser was told of a deed which might or might not affect the title, and was told at the same time that it did not affect the title. Supposing you are buying land of a married man, as in *Jones* v. *Smith* (1), and you are told at the same time that there is a marriage settlement, but the deed does not affect the land in question, you have no constructive notice of its contents, because although you know there is a settlement you are told it does not affect the land. If every marriage settlement necessarily affected all a man's land then you would have constructive notice, but as a settlement may not relate to his land at all, or only to some other portions of it, the mere fact of your having heard of a settlement does not give you constructive notice of its contents, if you are told at the same time it does not affect the land. I take it, under the modern practice, you are not bound to inquire, because the abstract furnished you is an abstract of every document affecting the land, and although you have been told that the man made a marriage settlement, you are not entitled to assume that the solicitor suppressed improperly the deed of settlement. I take it, if you asked for it, he might say "it has nothing to do with you." But that line of cases has no bearing at all on a case where you know the deed does affect the land, and the question as to the extent to which it does affect the land is to be ascertained only by looking at the deed itself. Therefore you have no right to rely on the statement of somebody else that the deed which you can look at does not contain something which it does in fact contain.

I have said so much on this point because there is no doubt an observation which was let fall by Lord Justice *Turner* in *Wilson* v. *Hart* (2), and which does to some extent countenance the contrary doctrine; but as regards the case of *Carter* v. *Williams* (3), before the Vice-Chancellor *James*, that, as I read it, entirely confirms my view. It is not fair to criticise the words used by the Vice-Chancellor, but when you look at the argument addressed to him you see the objection there was that the covenant was contained in a collateral deed, which was not recited. In *Coles* v. *Sims* (4) cited in *Carter* v. *Williams*, the restrictive covenant was recited in the conveyance. The Vice-Chancellor in *Carter* v. *Williams* (1) says that the covenant is contained in a separate deed, but what he means is this, that the deed is not noticed either by way of recital or by being referred to in the deed of conveyance, so that a person might get a complete chain of title without any notice of that deed. That is what he means, and that being so, of course if the tenant had asked for his lessor's title, and got it, he would not necessarily have got that information. The solicitor ought no doubt to have put it in the abstract if he knew of it, but he would not necessarily know of it. Then the Vice-Chancellor came to the conclusion that there being no evidence of anything to bring home to the tenant actual knowledge or notice of the restrictive covenant he could not hold he had constructive notice of it. Therefore, it appears to me, that case rather follows out the doctrine of *Jones* v. *Smith* (2) and by no means affects the other cases cited where the document in question affecting the title is recited or otherwise noticed in the title-deeds. In *Carter* v. *Williams*, any one could have accepted the title without being aware of the document containing the covenant.

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(1) 1 Hare, 43; 1 Ph. 244.
(2) Law Rep. 1 Ch. 463.
(3) Law Rep. 9 Eq. 678.
(4) 5 D. M. & G. 1.

18 Jun 683

I am therefore of opinion that the constructive notice which the lessee in this case obtained, would not have been done away with by the most express statement obtained from the lessor that there was no restrictive covenant. I must say that I am not satisfied in this case that there was any such representation. What appears to have occurred was this, the lessor did not of course shew his title, but he was aware that the lessee intended to use this property in the way she attempts to use it, and there was a proviso which excepted such user from the covenant in the lease, and consequently a person reading that lease would have assumed, and fairly assumed, that she had a right to use it in the way mentioned in the exception from the covenant. In that way there was a representation—an indirect representation—and there were in addition to that some further words in the lease which tended in the same direction. Therefore I think there was sufficient to put the lessee off her guard, if I may say so, if it were not that she had constructive notice, the effect of which no representation could have destroyed.

(1) Law Rep. 9 Eq. 678.

(2) 1 Hare, 43; 1 Ph. 244.

I wish to notice one other point; it is said that the new law as to the extent of title to be required by purchasers alters the rule. I think it does not: what the *Vendor and Purchaser Act* does is this, in order that a lessee may obtain his lessor's title, it makes an express stipulation to that effect necessary, whereas formerly the rule was the other way, that without express stipulation the lessee had a right to the title. Formerly, if the lessee had expressly stipulated not to look into his lessor's title, it would not have affected the constructive notice. This is the meaning of the doctrine; you may bargain to shut your eyes, but if you do wilfully shut your eyes, whether as a bargain or not, you must be liable to the consequences of shutting your eyes. If, therefore, the lessee had formerly expressly bargained to take a lease without looking into the lessor's title, the lessee would have been bound by constructive notice, and now if the lessee says nothing it is exactly the same as if formerly he had bargained expressly not to look into the lessor's title. Therefore, as he may refuse to take a lease without looking into the title (in some cases, especially in the case of building leases, lessees do look into the title, in other cases they do not), it appears to me that the law is unaltered, and that the doctrine of *Tulk* v. *Moxhay* (1) and that line of cases applies.

Then the lessee being bound by the covenant, the only remaining question is, What is the covenant, and has there been a breach of it? The covenant is not well worded, and will not perhaps carry out the full intention of the covenantee, but it is a covenant that they "shall erect private dwelling-houses only" on the piece of land. The lessee is building something which it would be rather absurd for any one to describe as a private dwelling-house, and I am glad to see that nobody does so describe it; it is described in the affidavit as a corrugated iron building, not in any way connected with the dwelling-house, or so situated at present as possibly to be used for a private dwelling-house. The lessee says it has been built as an addition to the house which is intended to be used as an art studio for ladies. There is no question that it has been erected for that purpose, and not for a private dwelling-house. It has been argued that this building, being within the same curtilage as the house, must be treated as

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(1) 2 Ph. 774.

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appurtenant to the dwelling-house, and forming part of it, in the same way as a billiard-room or smoking-room might be. But this is a thing of a totally different character. It could not be suggested that having built a private dwelling-house with a garden, if you then built a church or chapel at the other end of the garden, that church or chapel would be treated as a portion of the private dwelling-house, merely because it happened to be within the same curtilage—it would be a separate erection and not a private dwelling-house. It is in my opinion a clear breach of the covenant, and being so I shall restrain the further proceeding with its construction, which is all I think it right to order now, though if it is not taken away altogether before the trial of the action I may order it to be taken away then. The lessee has, I think, a right to convert the building if she can into a fair and reasonable adjunct to the private dwelling-house; that is the reason I do not now grant the mandatory injunction asked for. I shall not grant any injunction against the Defendant *Harland*, and his costs and the costs of all other parties will be costs in the action.

Solicitors: *W. H. Bennett; Edmund Newman; John Mackrell & Co.*

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In re BADCOCK.

KINGDON *v.* TAGERT.

[1880 B. 796.]

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1880
Dec. 20.

Marriage—Promise—Subsequent Settlement—Lapse of Time.

The father of a lady wrote to her intended husband that he and his wife had determined to settle on their daughter £2000, and that in addition she would have £2000 on her mother's death, and at least as much on her father's death. Eleven months afterwards the marriage took place; and on that occasion a formal agreement for a settlement of £2000 was executed, the letter not being in any way referred to. The mother died sixteen years and the father died twenty-five years after the marriage. The husband then claimed from the father's estate £4000 under the promises contained in the letter:—

Held, that the letter had, under the circumstances, been superseded by the agreement for a settlement, and claim disallowed.

IN the early part of the year 1853 the Rev. Mr. *Tagert* made proposals of marriage to Miss *Elizabeth Badcock*, one of the three daughters of *Henry Badcock*. Mr. *Badcock* proposed to allow his daughter £40 a year, but after a conversation with Mr. *Tagert*, Mr. *Badcock* wrote and sent the following letter:—

"*St. Stephen's*, 6th May, 1853.

"My dear Sir,—When you mentioned to me the circumstance of your proposal to my daughter the other evening (of which I had only been informed a few hours) I had given the subject of what we should give her no consideration, nor had I talked with Mrs. *Badcock* about it, which I have since done. I therefore now think it proper to inform you that we have determined to settle on her at once £2000, and, in addition to this, at her mother's death she will get £2000 more, and at my demise the same amount at least in addition, making together £6000. I have thought it better to be thus explicit at once; and I am, my dear Sir, yours sincerely, *Henry Badcock.*

"To the Rev. *Samuel W. Tagert, St. Thomas Street.*"

There was no evidence as to any further negotiation in the interval before the marriage.

On the 27th of April, 1854, Mr. *Tagert* was married to Miss *Badcock*, and an agreement for a settlement, dated the 26th of

April, 1854, was made between the Rev. *S. W. Tagert* of the first part, *Henry Badcock* and *Anne Sanford Badcock,* his wife, of the second part, *Elizabeth Badcock* of the third part, and *Henry Badcock* and *John Hooper,* gentleman, of the fourth part, and thereby, after reciting that the marriage was intended, and that on the treaty for the same, and as a marriage portion for the said *Elizabeth Badcock,* it was agreed that Mr. and Mrs. *Badcock* should each pay £1000 to the two trustees, it was agreed that the two trustees should hold the said sum of £2000 upon trust to invest the same in the purchase of an advowson or next presentation, and to nominate Mr. *Tagert* to the first vacancy thereof; and in the meantime to invest the £2000 and pay the income thereof to Mr. *Tagert* for his life, and, subject thereto, upon trust as to the capital and interest for such persons as Mr. *Tagert* should appoint, and, in default of appointment, upon trust for the children of the marriage as therein mentioned. This agreement was prepared by the solicitor of Mr. *Badcock,* but there was no evidence as to the circumstances of its preparation or execution.

Mrs. *Badcock* died in 1870. Mr. *Badcock* died in 1879, and an action was brought for the administration of his estate.

Mr. and Mrs. *Tagert* now claimed from the estate of Mr. *Badcock* the sum of £2000 and interest as from the time of the death of Mrs. *Badcock,* and the sum of £2000 as from the time of the death of Mr. *Badcock.*

Mr. and Mrs. *Tagert,* by their affidavit in support, deposed that the letter of the 6th of May, 1853, was treated by both of them as a definite contract on the part of Mr. *Badcock,* and that the negotiations which resulted in their marriage were renewed solely on the faith of and in reliance on that letter, and that the marriage would not otherwise have taken place. There was no issue of the marriage. It was stated at the bar that Mrs. *Badcock,* by her will, gave her residuary estate to her three daughters, and that Mrs. *Tagert* had received her share. Also that settlements of £2000 were made on the marriages of Mr. *Badcock's* two other daughters.

Bristowe, Q.C., and *Cozens-Hardy,* for Mr. and Mrs. *Tagert:*—

The marriage took place on the faith of the agreement in the letter; and the marriage settlement, as far as relates to the first

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£2000, carries the agreement into effect. *Hincks* v. *Allen* (1); *Hammersley* v. *De Biel* (2); *Prole* v. *Soady* (3); *Coverdale* v. *Eastwood* (4); *Laver* v. *Fielder* (5), are all in favour of the claim. In *Loxley* v. *Heath* (6) there was not a complete contract. There were in this case two separate and complete contracts, first to settle £2000 at once, and then to settle two other sums of £2000, and each must be carried into effect. In *Kay* v. *Crook* (7) there was a regular settlement, as in this case.

J. Pearson, Q.C., and *Prior*, in opposition to the claim:—

In order to substantiate such a claim it must be shewn that all parties intended the marriage to take place on the faith of the agreement, which is not the case here. Mr. *Tagert* may have intended it, but Mr. *Badcock* clearly did not. We are not informed what was done, but it is clear that in the interval an entire change had taken place. *Fowler* v. *Fowler* (8) was a very hard case and shews what the law is. Why was £2000 not claimed when Mrs. *Badcock* died? *Campbell* v. *Campbell* (9).

Northmore Lawrence, for the trustees of Mr. *Badcock's* will.

Bristowe, in reply:—

There is nothing to shew that the original agreement was ever abandoned, and Mr. *Tagert* says it was not. As to not claiming against Mrs. *Badcock's* estate, this is a claim against Mr. *Badcock's* estate, and has been brought at once.

MALINS, V.C., after stating the facts of the case, continued:—

There can be no question whatever that the letter of the 6th of May was an engagement which certainly would have been binding if the marriage had taken place on the faith of that document only. But if Mr. *Tagert*, when the marriage took place nearly a year afterwards, considered it a binding engagement, he

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(1) 28 W. R. 533. W.N. (1880) 57.
(2) 12 Cl. & F. 45.
(3) 2 Giff. 1. 5 Jur. N.S. 1382
(4) Law Rep. 15 Eq. 121.
(5) 32 Beav. 1. 9 Jur. N.S. 190
(6) 27 Beav. 523; 1 D. F. & J. 489.
(7) 3 Sm. & Giff. 407.
(8) 4 De G. & J. 250.
(9) Law Rep. 1 H. L., Sc. 182, 210.

(6) S.C. 6 Jur. N.S. 262, 436

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ought at least to have communicated that fact to the solicitor who prepared the settlement, and there is not a tittle of evidence that he did so. It seems that without any such communication this settlement was prepared. [His Lordship then read the recitals and other parts of the settlement.] There is a general power of appointment given to Mrs. *Tagert*, and, as there are not any children, no doubt the result will be that the money will go to Mr. *Tagert.*

Now, Mr. *Tagert* may have been told by somebody—I suppose he would hardly form any opinion of his own upon the subject—that he need not say anything about this letter, because he would get the £2000 settled, and the letter would give him £2000 more when the mother died, and £2000 more when the father died. That, certainly, would have been very bad advice; because it was his duty to shew the letter to Mr. *Badcock's* solicitor, in order to enable him to prepare a settlement accordingly. Instead of that, the letter was kept back; though it is now stated that it has always been very carefully preserved; and it is brought forward for the first time after the death of Mr. *Badcock.* This is very embarrassing, as we cannot now positively come to any conclusion as to the facts. It may be that between the 6th of May, 1853, when the letter was written, and the 23rd of April in the following year, when the marriage took place, this intention of giving £6000 was altogether abandoned. Mr. *Badcock,* finding that his other daughters were likely to marry, may have looked more closely into his affairs and found that he could not give each daughter £6000; and in his will he gives his property equally, so that I do not believe that he intended to give Mrs. *Tagert* more than he gave to the other daughters. But if this claim were to prevail, they would take very unequally; because I am satisfied from all I have heard of the state of the assets that there would be very little left for the other daughters if this £4000 claim were to be established. I therefore come to the conclusion that the intention of giving £6000 to Mrs. *Tagert* had been abandoned. I make no imputation whatever upon Mr. *Tagert,* and it is very likely that after so long a lapse of years he may have forgotten what took place.

I repeat that if the marriage had taken place shortly after the writing of that letter, I should have felt myself bound to say that Mr. *Badcock's* estate must pay the £4000, if it is able to do so. But this formal settlement afterwards executed must, I think, upon the soundest principles, be regarded as a final adjustment of all the rights of the parties under that marriage.

Mr. *Bristowe* has pressed very much upon me the case of *Prole* v. *Soady* (1), but that can hardly be considered as a very distinct authority, because the decision of Vice-Chancellor *Stuart* was appealed from, and, as I well remember, the Lords Justices, finding a difficulty, declined to decide it one way or the other, and said that there had better be a compromise, and a compromise was accordingly made. But there is a remarkable difference between that case and this, as Mr. *Dickson*, who was decided by Vice-Chancellor *Stuart* to be bound by his contract to make the settlement upon Mrs. *Prole*, never made any subsequent settlement, though Mr. *Prole* did make a subsequent settlement.

If parties will enter into vague arrangements of this sort, they must put up with the consequences. I had lately before me a case of *Viret* v. *Viret* (2), where a letter was written the very day before the marriage, and then, without anything more having been done, the marriage took place. I could not do otherwise than

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(1) 2 Giff. 1. 5 Jur NS. 1382.

(2) V.-C. M. 1880. Nov. 19. WN (1880) 184

VIRET *v.* VIRET.

PREVIOUSLY to the marriage of *Edward Viret* with *Constance Wright*, a Mr. *Mackenzie*, a friend of Miss *Wright's*, wrote a letter to Mr. *Viret* asking him, in the event of his marrying before a settlement could be prepared, to write a letter to Miss *Wright's* solicitor engaging to make a settlement of her property. A letter was accordingly written by Mr. *Viret* agreeing to settle her property, which was entirely reversionary. At the same time negotiations as to a settlement of Miss *Wright's* property and also of Mr. *Viret's* property were going on between their respective solicitors, but the marriage took place without any settlement being executed. This action was brought in order to determine whether the letter written by Mr. *Viret* constituted a binding agreement for a settlement.

Millar, Q.C., and *Warmington*, for Mr. *Viret*, contended, first, that there was no writing within the *Statute of Frauds;* and, next, that the marriage took place without relation to the letter.

Colt, for the issue of the marriage.

Everitt, for trustees.

HIS LORDSHIP was of opinion, on the evidence, that a settlement had always been contemplated, and that the letter was written in connection with the marriage, which took place

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come to the conclusion that the marriage had taken place upon the faith of the letter. Where contracts by correspondence are entered into, and formal settlements are afterwards executed, justice and sense requires that the subsequent settlements should be considered as the embodiment of all the parties intended to do.

That, I should say, is the case on principle; and what are the authorities? Mr. *Pearson* rightly referred to *Hammersley* v. *De Biel* (1). [His Lordship then stated the facts of that case.] Why, then, was this so binding? Not because the letter was written simply before the marriage, and then a settlement was executed which embodied, or was thought to embody, the whole contract between the parties, but because the very contract was repeated to the husband when the settlement was executed; and therefore to say that such a contract as that could be repudiated, when the settlement was executed, he being a foreigner and not understanding English law, would be perfectly monstrous. Now, in this case, if I had evidence that when this settlement was drawn Mr. *Badcock* had said that he intended to abide by the letter of the 6th of May, it would have been in vain to have said that the settlement had concluded the matter.

Then there is what appears to me the very conclusive authority of *Loxley* v. *Heath* (2). [His Lordship then stated the facts of that case.] Lord *Romilly* having decided that the contract failed on account of the death of the wife, it went before the Court of Appeal, which affirmed Lord *Romilly's* decision, but not, as Lord *Campbell* puts it, on precisely the same ground, because they decided it on the ground on which I am about to decide this case, that I must consider the settlement as embodying all the contract which existed between the parties at the time when it was executed. Now, nothing can be more clear than the judgment of Lord *Campbell*. [His Lordship read the concluding part of that judg-

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soon afterwards; and, according to the letter, Mr. *Mackenzie* was to be considered as agent for Miss *Wright*, and there was a valid agreement for a settlement. Mr. *Viret* must do all that he could to give effect to the agreement, and his wife must concur. The settlement would be in the usual form, and would be approved of in Chambers.

Solicitors: *W. H. Tattam*; *Eady*; *S. R. Lewin & Co.*

(1) 12 Cl. & F. 45.

(2) 27 Beav. 523; 1 D. F. & J. 489.

Ajmk S. 962. 436

ment.] And his observations are entirely applicable to this case if there had been no deed and the marriage had taken place upon the faith of the correspondence. And the Lord Justice *Knight Bruce* and the Lord Justice *Turner* both expressed themselves to the same effect.

Therefore I think, upon those authorities, as well as upon principle, that the marriage settlement as executed contains the whole contract between the parties, and whatever there may have been before that I must consider as abandoned and given up.

But in this case there is, to my mind, an overwhelming reason why I should not admit this claim. According to the contract, £2000, which is part of the £6000, having been paid down, £2000 more became payable upon the death of Mrs. *Badcock*, who died in 1870. Why was the claim not brought forward during these ten years? If it had been made, Mr. *Badcock* could have told his story. He could have told us why it was that this letter, written on the 6th of May, 1853, was never acted upon, and why, when he agreed by the letter to settle £6000, he subsequently settled £2000 only. It was the duty of Mr. *Tagert*, and a thing which he owed to himself, to bring forward such a claim while there was an opportunity of its being resisted by one of the parties to the contract, who could prove what was meant, and not to keep it back until after the death of the party.

I, therefore, decide that the claim upon the estate is altogether groundless. I am glad to find that my decision is one which will work complete justice between the parties. It leaves the daughters of the testator equal shares of the property; and, under all the circumstances, I think it would have been very unjust if Mrs. *Tagert* had got a greater share than the others.

Solicitors for Mr. and Mrs. *Tagert*: *Pattison, Wigg, & Co.*
Solicitors for the other parties: *Bell & Steward.*

C. M.

V.-C. M.
1881
Jan. 14.

COOPER *v.* LAROCHE.

[1866 C. 24.]

Daughters' Shares—Restraint on Alienation—Rule against Perpetuities.

A testator gave his property to trustees to pay the income to two persons for life, and after the death of the survivor to divide the capital between the children of *A. B.* and *C. D.*, two females, the shares of sons to be paid on their attaining twenty-one, and the shares of daughters to be invested and the interest paid to such daughters for life for their separate use without power of anticipation, and on their deaths the capital to go as the daughters should by will appoint. *A. B.* was dead at the date of the will, and *C. D.* was sixty years of age, and therefore past child-bearing:—

Held, that if the children of *A. B.* and *C. D.* had not necessarily been lives *in esse* at the date of the will, the restraint on anticipation in respect of the daughters' shares would have been bad, as infringing the rule against perpetuities; but as *A. B.* was dead and *C. D.* past child-bearing, all the children were lives *in esse*, and the restraint on alienation was valid.

THOMAS W. LAROCHE, by his will, dated the 1st of May, 1860, devised and bequeathed to trustees all his estate and effects upon trust to sell and invest the proceeds in certain securities therein mentioned, and to pay the income thereof to his wife *Joanna Laroche* (since deceased) for life, and after her decease to pay, out of the dividends, interest, and annual produce, to the Petitioner, *Elizabeth Laroche*, the widow of his son *Thomas*, an annuity of £300 during her life, and the residue of the dividends, interest, and annual produce, as also the said annuity of £300, in case of the death of *Elizabeth Laroche* in the lifetime of *Elizabeth Rowland*, unto the said *Elizabeth Rowland*, therein described as the sister of the testator's wife, during her life. And after the decease of his wife and *Elizabeth Rowland*, the testator directed his trustees to set apart a sufficient portion of the said stocks, funds, and securities for the payment of the said annuity of £300 to *Elizabeth Laroche*, or to purchase a Government annuity of £300 for her life, and in case his trustees should set apart a sufficient sum to meet the said annuity, then the said stocks, funds, and securities should, on the decease of *Elizabeth Laroche*, fall into and become part of the residue of his estate. And upon trust to sell and dispose of the whole of his said residuary estate and to divide the proceeds amongst the children of *Elizabeth Rowland* and the children of *Agnes Wakefield* (then deceased and who was another sister of the testator's wife) who should be living at the time of the decease of the survivor of them the said *Joanna Laroche* and *Elizabeth Rowland*, and who should within two years after the decease of such survivor claim to be entitled to the same, in equal shares and proportions as tenants in common, the shares of such of them as should be males to be paid to them respectively on attaining twenty-one years, and the respective shares of such of them as should be females the testator directed his trustees to invest in securities of a like nature as thereinbefore mentioned, and to pay the interest, dividends, and annual produce arising and accruing from such investments unto such females respectively during the term of their or her natural life, for their respective separate use and without power of anticipation. And from and after the decease of such females respectively, upon trust to transfer, pay, or divide the same trust funds and securities in or upon which the shares of such respective females should be invested, unto such persons and for such purposes as such females respectively should by will appoint, and in default of any such appointment unto and amongst the survivors of them the said children of *Elizabeth Rowland* and *Agnes Wakefield.*

It appeared that there were four children of *Elizabeth Rowland*, two sons and two daughters, and that there were three children of *Agnes Wakefield*, one son and two daughters. Upon the marriage of *Agnes Rowland*, one of the daughters of *Elizabeth Rowland*, which took place in July, 1869, a settlement was executed by which the life interest in the share given to her by the testator's will was reserved to her during her life for her sole use and without power of anticipation. No settlement had been made upon the marriage of any other of the daughters of *Elizabeth Rowland* or *Agnes Wakefield* which in any way affected the shares to which they were entitled.

A petition was now presented by the persons beneficially entitled, praying that a sufficient sum should be set apart out of the property to answer the annuity of £300 to *Elizabeth Laroche*, and that the remainder should be divided between the children of *Elizabeth Rowland* and *Agnes Wakefield* in equal shares.

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The only question raised was whether the restraint on anticipation in respect of the daughters' shares was bad, as being contrary to the rule against perpetuities.

J. Pearson, Q.C., and *J. Kaye*, in support of the petition.

Higgins, Q.C., and *Creed*, for a second petition, presented by *Elizabeth Laroche.*

Glasse, Q.C., and *Whitehorne*, for the daughters:—

Under this will the property is to be divided between the children of *Elizabeth Rowland* and the children of *Agnes Wakefield* who should be living at the decease of the survivor of *Joanna Laroche* and *Elizabeth Rowland*; and the shares of the daughters are to be invested by the trustees and the dividends paid to such daughters for their separate use without power of anticipation. The simple question is whether this is or is not contrary to the rule against perpetuities. Our duty is to argue that restraint on alienation is bad, and therefore the daughters take absolute interests. These were children who were not necessarily *in esse* during the testator's lifetime. As a matter of fact no further children were born. The difficulty arises in regard to several recently decided cases. The first is *Buckton* v. *Hay* (1), before the Master of the Rolls. There a fund was given by will in trust for *A.* for life, and after her death in trust for her children living at her death and the issue then living of any deceased child, in equal shares, the issue to take their parent's share, and any legatees, being females, to take for their sole and separate use, without power of anticipation. *A.* survived the testator and died leaving two married daughters who were born in the testator's lifetime. The Master of the Rolls held—reluctantly following previous decisions—that the restraint on anticipation was void as infringing the rule against perpetuities, and that the daughters were entitled to have their share paid to them in equal shares on their separate receipts, discharged from such restraint. His Lordship seemed to be of opinion that a restraint on alienation in regard to married women was an exception to the general rule against perpetuities, and that it was beneficial to break into the

(1) 11 Ch. D. 645.

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general law in this respect, and in referring to your Lordship's decision in *In re Cunynghame's Settlement* (1), he says, "The whole argument of his judgment was, that it was a restraint which might extend beyond the limit, and was therefore void, but he did not consider whether, though extending beyond the limit, it was not an exception to the general rule."

Then there is the case of *Herbert* v. *Webster* (2), in which, by a post-nuptial settlement, a sum of money was given to trustees for the benefit of all the children of the marriage, sons at twenty-one and daughters at twenty-one or marriage, in equal shares, and if daughters, for their separate use and without power to alienate or anticipate their shares. There were only two daughters of the marriage, both of whom were alive at the date of the settlement, and Vice-Chancellor *Hall* held that, notwithstanding the rule against perpetuities, the shares of the two daughters were subject to restraint on anticipation.

Those two cases evidently cannot stand together. In the former case the Master of the Rolls would not have so decided if he had not considered himself fettered by authority.

The following cases were also referred to: *In re Michael's Trusts* (3); *Wilson* v. *Wilson* (4); *Thornton* v. *Bright* (5); *Armitage* v. *Coates* (6).

Higgins, Q.C.:—Your Lordship should be informed that at the date of the will all the children were *in esse*. Mrs. *Wakefield*, the mother of three of the children, was dead, and Mrs. *Rowland*, the tenant for life and mother of the other children, was sixty years of age, and therefore past child-bearing.

MALINS, V.C.:—

Upon the general question whether, where the property is by will or settlement limited to a person for life with remainder to the children, that is, to a class of children, or persons not *in esse* at the date of the settlement or will under which they take—whether they can be restrained from anticipation, I entertain no doubt whatever that the decision of Lord *Cottenham* in *Thornton* v. *Bright* (1) is perfectly right, and rests on the soundest principles of law; because there is no rule of law in *England* more absolute than that all property, whatever may be its nature, real or personal, must be absolutely vested in some person, and be alienable within a life in being and twenty-one years after; and if a restraint on anticipation were allowed to be attached to a gift to a female taking under such a will or settlement, the result might be, which is quite sufficient to infringe the law against perpetuities, that the property would be inalienable for the whole of a life after the expiration of a life in being—in other words, it might be even for a century after the death of the tenant for life.

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(1) Law Rep. 11 Eq. 324.
(2) 15 Ch. D. 610.
(3) 46 L. J. (Ch.) 651. WN (1877) 134.
(4) 4 Jur. (N.S.) 1076.
(5) 2 My. & Cr. 230.
(6) 35 Beav. 1.

Now, I will take the simple case of real estate given to *A.* for life, and after his decease to the first daughter of *A.* who shall attain the age of twenty-one years. That is a perfectly valid gift; but then it is added that such daughter shall have the property for her separate use without power of anticipation. *A.* dies. The daughter having attained the age of forty, offers the property for sale; if she has it for her separate use, and separate use only, without any restraint on anticipation, being a married woman she may sell this property concurrently with her husband, but if she is restrained from anticipation, then the property is inalienable. Now, forty years after the death of the tenant for life is a period which cannot, in my opinion, be allowed. Therefore, if I were called upon to decide the general point, I should certainly have decided that the restraint on anticipation, attached to the estate of a person not *in esse*, or not necessarily *in esse*, when the instrument, be it a settlement or will, takes effect, is absolutely void, as tending to that perpetuity, against which the rules of law in *England* are absolute. The Master of the Rolls thinks I did not decide the point in *In re Cunynghame's Settlement* (2), but I am quite satisfied I did decide it on that broad principle, and it is firmly fixed in my mind as being a right principle, to which I shall adhere until the Court of Appeal decides to the contrary.

But in the present case I am not required to decide that point. I think the instrument is free from difficulty, because it turns out that the disposition only amounts to one tenancy for life. The

(1) 15 Ch. D. 610.

(2) Law Rep. 11 Eq. 324.

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parent of one set of children was already dead when the will was made, and, therefore, the children of that parent were all lives in being; and with regard to the other legatee, although she was tenant for life with remainder to all her children, I am informed, and all the counsel agree, that she was at an age past child-bearing, namely, sixty years of age, and it is to be concluded, therefore, that she could never have another child. Consequently all her children were also lives in being. The result, therefore, is, that this is a gift to persons who were *in esse*, and with regard to a person *in esse*, you may give it with or without any restraint, or you may give it over during the life of that person, or on the death of that person, or within twenty-one years after. Therefore, these being gifts to persons *in esse*, they can enjoy the property to their separate use without power of anticipation, and of that there cannot be the possibility of doubt. Consequently the point does not arise, and the daughters will take their shares and will be restrained according to the terms of the will.

Solicitors: *Alfred Howard; Billing & Kent.*

T. W. G.

In re SCOTTISH PETROLEUM COMPANY.

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1881
Feb. 3.

Change of Directors—Allotment—Shareholder's Name removed.

An applicant for shares in a company received a letter of allotment, and at the same time a letter informing him that two of the four directors named in the prospectus had retired. The applicant on the same day wrote to the company stating that he had applied for shares entirely in consequence of these two directors being directors, and asking to have the allotment cancelled:—

Held, that under the circumstances the applicant was entitled to have his name removed from the register of shareholders.

Hallows v. *Fernie* (1) distinguished.

18 Ch D
452
23 ChD 414
416-7-8
422-7, 48
434-5, -6.

THE *Scottish Petroleum Company* was formed for the purpose of acquiring some petroleum works near *Paris*. Capital £30,000, in

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(1) Law Rep. 3 Ch. 467.

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3000 £10 shares. The directors named in the articles of association and in the prospectus were *A. H. Gibson*, merchant (the chairman), *J. M. Ross*, merchant, *D. Simpson* (the vendor), and *G. Yooll*, manufacturing chemist.

Mr. *John Anderson* and Mr. *James Anderson*, on the 8th of November, 1880, each paid a deposit of £50, and applied for fifty shares, having been, as they stated in their affidavit, induced to apply entirely through the names of Mr. *Gibson* and Mr. *Ross* appearing on the prospectus as directors.

On the 9th of November, 1880, the solicitors of Mr. *Gibson* wrote to the solicitors of the company that in consequence of other duties and engagements he would not be able to allow himself to be appointed a director of the company; and on the 12th of November Mr. *Ross* wrote that in consequence of the resignation of Mr. *Gibson* he could not allow himself to be appointed a director of the company.

On the 13th of November letters of allotment of fifty shares each were sent to Messrs. *Anderson*, with a demand for further payment; and with them were letters stating that Mr. *Gibson* and Mr. *Ross* had retired from the board of directors and giving the names of two directors substituted for them.

These letters appeared to have reached Messrs. *Anderson* at *Glasgow* on the 16th of November, and on the same day each wrote to the secretary of the company stating that it was entirely in consideration of Mr. *Gibson* and Mr. *Ross* being directors, and in consequence of Mr. *Gibson* having stated that he would personally superintend and look after the business, that the application for shares had been made, and requesting the secretary to cancel the application and return the deposit of £50. The directors refused to do this, and a motion was now made on behalf of Messrs. *Anderson* that the register of members of the company might be rectified by removing their names therefrom. It was stated at the Bar that 630 shares only had been allotted, but the company was going on.

Higgins, Q.C., and *W. W. Cooper*, for Messrs. *Anderson*:—

This is not like *Hallows* v. *Fernie* (1), for here directly they heard that Mr. *Gibson* and Mr. *Ross* had retired they repudiated: *Blake's Case* (1); *Kirk* v. *Bell* (2).

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(1) Law Rep. 3 Ch. 467.

Glasse, Q.C., and *Buckley*, for the company:—

There has been here no fraud and no misrepresentation. The shares were regularly allotted, and the directors had no power to cancel the allotment. There must be hundreds of cases in which a change of directors has been made between the issue of the prospectus and the allotment; in fact, no valid allotment could ever be made if such an excuse was sufficient. An allottee might as well say that he had relied on the solicitors or on the engineer. Suppose that Mr. *Gibson* had resigned after the allotment. Could they then have got off? How long was he bound to remain a director? As to only 630 shares having been allotted, 3000 were named as the extreme number, but there is no reason why the company should not go on with less.

MALINS, V.C.:—

This case, to my mind, is so clear that my only wonder is that it has been necessary to occupy two hours in discussing it. In all these transactions connected with the formation of companies the Court requires that there shall be straightforward, candid conduct; and I think that straightforward and candid conduct required in this case that the persons who applied for shares on the faith of one state of things should have had the option of retiring when a totally different state of things came into existence.

As to the facts there is no dispute. [His Lordship then stated the facts.] Messrs *Anderson* said, reasonably enough in my opinion, that they made application for these shares because they knew Mr. *Gibson* and had confidence in him, and but for the fact of his being the chairman they would not have applied at all. Mr. *Glasse*, on behalf of the company, says it was a candid proceeding, and that there was nothing dishonest in it. I do not think there was when the prospectus was issued, because it was believed that Mr. *Gibson* and Mr. *Ross* would act; but when the company found that these gentlemen would not act they were bound to issue a new prospectus containing other names, and to inform those who had applied for shares that before the allotment was made other directors had been appointed; and then it would be for the applicants for shares to say, under those circumstances, whether they would adhere to their offer or would withdraw it. These gentlemen at once took a business-like view of the matter. They did not comply with the request to pay £2 per share; but on the same day—by return of post—they said, "We took the shares on the faith of Mr. *Gibson* being chairman and Mr. *Ross* being a director, we find now that they are out of the concern, and we decline to have anything more to do with it, and beg you to take our names off the list." Could anything be more reasonable, straightforward, or proper? And the directors ought to have said, "We feel that the state of things on the faith of which you made your application, no longer exists, and we give you the option of withdrawing." But instead of that, having issued a prospectus that there would be 3000 shares, they allotted shares when they had only applications for about 600; and now they persist in holding these gentlemen to their applications for shares. That proceeding on the part of the company is, in my opinion, one of a most unjust character. Mr. *Glasse* says, however, that I am bound by authority. I should be very sorry if I were bound by authority, because it would violate every principle of contract. Suppose there is an announcement that a certain state of things exists—for instance, that the public are invited to take tickets for a concert, on the ground that a particular person is going to perform or sing, then, if that person does not perform or sing, the public taking the tickets are entitled to have their money back because the contract is broken.

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(1) 34 Beav. 639. 11 Jur. N.S. 159.   (2) 16 Q. B. 290.

Now what are the authorities? I have before me the decision of the Master of the Rolls in *Blake's Case* (1), which entirely agrees with my view of the case that under such circumstances a shareholder is not bound. [His Lordship read a great part of the judgment.] The Master of the Rolls puts it on the ground that if a man takes shares in a company believing that *A.* is a director, and having faith in him, and it turns out that *A.* is not a director, he is at liberty to repudiate the allotment of shares.

(1) 34 Beav. 639. 11 Jur NS 359

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But *Hallows* v. *Fernie* (1) is mainly relied upon. I should be bound by that case if the circumstances were similar. But in that case Mr. *Hallows* applied for shares in a company with certain gentlemen named as directors; and payment was made by him on application and on allotment. Some of the directors retired. Now when a company is once constituted every man knows that there is a liability to change in the body of directors—you cannot make men perpetual directors; and if in this case Mr. *Gibson* and Mr. *Ross* had remained directors after the allotment of the shares, then those who applied for shares must have taken them subject to the chance of the directors changing, as they may change, by death or resignation, and cannot complain if those on whom they relied do not remain in the company. They must take the chance of that. In *Hallows* v. *Fernie* the allotment was made in May, and the shareholder did not apply to be released until the month of September following—in fact, he did not file his bill until April in the next year, a period of eleven months. Lord *Chelmsford*, L.C., puts it entirely on the ground that the shareholder had received the allotment and retained the shares. He says (2), "I am quite unable to appreciate the objection founded upon a change in the direction, even if that change had been greater than that of one director for another. If the directors were regularly appointed, and had duly allotted the Plaintiff's shares, and he retained them, I do not see upon what principle he can now repudiate the contract, because (as he says) he was led to believe that it would be entered into with other parties than those by whom the allotment was made." I too desire to be understood as saying that if the *Andersons*, after they had received the letters telling them of the resignation of these two gentlemen, had paid upon their shares, and had adopted the contract, that would have bound them, and it would be in vain for them to apply to be taken off the list. Although the sending of a letter of allotment would generally be binding, still in this case, when a new state of things had arisen, these gentlemen were at liberty to repudiate the contract on that ground. There was nothing dishonest on the part of the directors, but it was their bounden duty to give the applicants the option of withdrawing.

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(1) Law Rep. 3 Ch. 467.

(2) Law Rep. 3 Ch. 473.

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It is clear to my mind that the Applicants are not bound to take the shares, and their names must be taken off the list of contributories, and the costs must be paid by the company.

CUR.:—Rectify the register by removing the Applicants' names; costs to be paid by the company as between solicitor and client; such costs to be given by way of damages.

Solicitors for Messrs. *Anderson*: *Sandom, Kersey, & Knight.*
Solicitors for Company: *Neish & Howell.*

C. M.

V.-C. M.
1881
Feb. 11.

Ex parte HOSPITAL OF ST. KATHARINE.

Company—Purchase of Land—Reinvestment of Money—Redemption of Land Tax—Costs—Private Act—Rules of Court, 1875, *Order* LV.*—Discretion of Court.*

[illegible]
4 CLD 670

A company purchased lands under a private Act of Parliament, which provided that the company should pay the costs of reinvestment of purchase-money in "lands, tenements, and hereditaments":—

Held, that the costs of reinvestment in the redemption of land tax must be paid by the company.

The purchase-money having amounted to £125,000, the Court did not consider six applications for reinvestment, still leaving £38,440 uninvested, to be unreasonable.

The Court has now, under the *Judicature Act,* 1875, and Order LV. of Rules of Court, 1875, a discretion as to directing payment of costs where a provision as to costs is omitted in any public or private Act.

THIS was a petition by the Master of the hospital of *St. Katharine* that part of a sum of money which had been paid into Court by the *St. Katharine Docks Company* upon the purchase of land from the charity might be ordered to be laid out in the redemption of land tax chargeable in respect of land belonging to the charity, and the petition asked that the *Docks Company* might be ordered to pay the costs of the petition and of the reinvestment of the money. The payment of costs was resisted by the company on the ground that by their private Act of Parliament, 6 Geo. IV., the Court could only direct costs to be paid in case the money was reinvested in the purchase of "other houses, buildings, lands,

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tenements, or hereditaments," and not where money was reinvested in the redemption of land tax. Under the Act of 6 Geo. IV., for constructing the *St. Katharine Docks,* power was given to the company to take lands and in certain cases to pay the purchase-money into the *Bank of England,* to be applied, under the direction of the Court (signified by an order on petition), "in the redemption or purchase of the land tax, or the discharge of any debt or debts or such other incumbrance, or part thereof, as the Court should authorize to be paid affecting the same hereditaments, or affecting other houses, buildings, lands, tenements, or hereditaments standing settled therewith to the same or the like uses, intents, and purposes; or to be otherwise invested under the direction of the Court in the purchase of other houses, buildings, lands, tenements, or hereditaments to be conveyed and settled to the like uses, and in the same manner as the houses, lands, tenements, and hereditaments which should be so purchased or taken." And by a subsequent section it was provided "that it should be lawful for the Court to order the expenses of such last-mentioned purchases, or so much of such expenses as the Court should deem reasonable, together with the charges of obtaining such order, to be paid by the *Docks Company.*"

Cherry, in support of the petition, referred to *In re Bethlem Hospital* (1).

Whitehorne, for the company:—

The first clause in this Act, no doubt, gives power for the re-investment of purchase-money in the redemption of land tax, but the only power given to the Court to award costs is by the subsequent clause, which expressly confines the costs to "such last-mentioned purchases," and those last-mentioned purchases are "other houses, buildings, lands, tenements, or hereditaments." The Court is bound strictly by the words of a private Act of Parliament, and can only give costs in the particular cases provided for by the Act: *In re Lord Stanley of Alderley's Estate* (2); and in *In re Cherry's Settled Estate* (3) costs were refused under a private Act,

(1) Law Rep. 19 Eq. 457.
(2) Law Rep. 14 Eq. 227.
(3) 31 L. J. (Ch.) 351.

8 Jm n 5446

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although they would have been payable under the *Lands Clauses Act*. *In re Harrison's Estate* (1) and *In re Charity Schools of St. Dunstan-in-the-West* (2) are to the same effect. The question in *In re Bethlem Hospital* (3) arose under the *Lands Clauses Act*, which is not the same as this case, which is under a private Act.

Another objection to these costs being paid is that it is unreasonable to have so many applications for reinvestment. Here there have been six, and this is for the sum of £685 out of the purchase-money, which was £125,000. There is still £38,440 to be invested, and some limit ought to be fixed to these repeated applications, which at this rate might extend to an unlimited number.

MALINS, V.C.:—

This Act is not so cautiously worded as the *Lands Clauses Act*, but even that Act appears not to be particularly well expressed. The objection raised by the company to the payment of costs depends upon two sections of the Act. [His Lordship read the sections.] Accordingly, various investments of this purchase-money have been made from time to time, and the *Docks Company* have paid the costs of such investments. But now the managers of the charity propose to lay out a further sum of £685 in the redemption of the land tax in respect of land belonging to the charity, and the *Docks Company* contend that, although any amount of money may be laid out in the redemption of land tax, yet they are not liable to pay the costs of such reinvestment, because of the latter section of the Act, which says "that it shall be lawful for the Court to order the expenses of such last-mentioned purchases, or so much of such expenses as the Court shall deem reasonable, together with the charges of obtaining such order, to be paid by the *Docks Company*;" and it is said that this clause as to payment of costs applies only to the last-mentioned purchases in the previous clause. Now, supposing that to be the proper construction of the words, still the last-mentioned purchases in the previous clause are, "the purchase of other houses, buildings, lands, tenements, or hereditaments;" and, in my opinion, the purchase of land tax comes within the words "lands, tenements, and hereditaments; and I think, therefore, the Court has power to order payment of the costs for the redemption of land tax. I find that the Master of the Rolls (Lord *Romilly*) has taken the same view in *In re Bethlem Hospital* (1). That case arose upon the construction of the 80th section of the *Lands Clauses Act*, which says that the costs payable by a company are to include the costs of investments in the purchase of lands, and by the interpretation clause the word "lands" is to extend to tenements and hereditaments of any tenure. The Master of the Rolls considered that he was at liberty to look at the spirit and meaning of the Act as well as the words, and he came to the conclusion, upon the authority of several cases there cited, that the company must pay the costs of reinvestment in the redemption of land tax, on the ground that it came within the words "tenements and hereditaments." I decide this case on the same ground, that the reinvestment in the redemption of land tax comes within the spirit and meaning of the words of this Act, and that the company must pay the costs.

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(1) Law Rep. 10 Eq. 532.

(2) Law Rep. 12 Eq. 537.

(3) Law Rep. 19 Eq. 457.

Another objection is raised on the ground that it is not reasonable to have so many applications for the reinvestment of the money. The facts appear to be these: that the original sum paid for the land was £125,000, and there have already been six different applications for reinvestment. The present purchase is for a small sum of £685, and there will still remain in Court £38,440. It is not for me to go into all these investments to see whether the money might not have been laid out in larger sums at one time. The company take land for their own convenience, and they cannot object to pay the costs of reinvestment in purchases which suit the convenience of the persons from whom they take the land. The order will therefore be that the company pay the costs, according to the petition.

Glasse, Q.C., then referred his Lordship to a recent case of *Ex parte Mercers' Company* (2), where it was held by the Master of the Rolls to be now immaterial to consider whether any public or private statute passed prior to the *Judicature Act*, 1875, had made

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(1) Law Rep. 19 Eq. 457.

(2) 10 Ch. D. 481.

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Ex parte HOSPITAL OF ST. KATHARINE.

or omitted to make any express provision as to the costs of particular proceedings under such statute, inasmuch as the combined effect of the *Judicature Act* and Order LV. of the Rules of Court, 1875, giving the Judges a discretion as to costs in all cases, with certain specified exceptions, was to repeal all previous enactments directing costs to follow certain rules; and where a previous statute is silent as to the costs of particular proceedings under it, to supply the omission.

MALINS, V.C.:—I am glad to have been referred to that case, because it settles the question, and shews that, independently of the terms of this Act, the Court has authority to do what I have now done.

Solicitors: *White, Broughton, & White*; *Hacon.*

T. W. G.

V.-C. M.
1881
Jan. 13.

MERRILL *v.* MORTON.

[1871 M. 115.]

Construction of Will—Nephews and Nieces—Consanguinity or Affinity.

A testator devised freehold property to be divided between the children of his sister-in-law and *A.* and *B.*, and "my niece *M.*" (the last-named three devisees being nieces of his deceased wife). He gave other real property to trustees upon trust for sale, and to pay the income of the proceeds of sale amongst "all my nephews and nieces," for their lives and the life of the survivors of them, and bequeathed the capital to the survivor, and he gave other real property unto "all my said nephews and nieces" as tenants in common, and he gave his residuary realty upon trust to pay the income to "all my said nephews and nieces" for their lives and the life of the survivor, and then devised such residue to the survivor, and bequeathed his residuary personal estate equally amongst "all my nephews and nieces":—

Held, that the circumstance of the testator having given property to his wife's nieces, and having even called one of them his niece, was not sufficient to include any of his wife's nephews and nieces in the subsequent gifts to all his nephews and nieces; and those only who were related by consanguinity were entitled to take.

Grant v. *Grant* (1) dissented from.

NATHANIEL FOSTER, by his will, dated the 5th of January, 1870, gave and devised four closes of land in *Wainfleet*, containing

(1) Law Rep. 5 C. P. 380, 727.

about fourteen acres, to trustees upon trust to pay the rents and profits thereof to *Ann Grantham* (sister of his late wife) for life, and after her decease he gave and devised the said four closes of land "unto the children of the said *Ann Grantham* and *Susannah*, the wife of *William Holbrook*, and *Eliza*, the wife of *Samuel Abraham*, and my niece *Mary Williamson*, their heirs and assigns, as tenants in common and not as joint tenants." The testator then devised certain real estate in *Boston, Lincolnshire*, and in *Friskney*, to his trustees, upon trust to sell the same, and invest the proceeds upon Government or real securities, and to pay the interest or annual produce arising therefrom equally amongst "all my nephews and nieces for and during the term of their natural lives and the life of the survivor of them," and he bequeathed the money so invested, with all accumulations of interest thereon, "to such survivor of my said nephews and nieces, his or her executors, administrators, and assigns absolutely." The testator then gave certain other real estate in *Thorpe* upon trust to let the same to a person therein named for life at a specified yearly rent, and after payment of a certain amount, to pay the net remaining rents and profits thereof to "all my said nephews and nieces" for their lives and the life of the survivor of them, and after the death of the tenant, he gave and devised the said real estate at *Thorpe* "unto all my said nephews and nieces," their heirs and assigns, as tenants in common. And the testator gave the residue of his real estate to his trustees upon trust to pay the rents and profits thereof equally amongst "all my said nephews and nieces" for their lives and the life of the survivor; and he devised the residue of his real estate to such survivor "of my said nephews and nieces," his or her heirs and assigns for ever. And he gave all his residuary personal estate to trustees to convert the same into money, and after payment of his debts and legacies to divide the residue "equally amongst all my nephews and nieces share and share alike."

The testator died on the 6th of January, 1870, and at his death he had nineteen nephews and nieces living, who were sons and daughters of his own brothers and sisters, and there were also living at his death seven nephews and nieces of his deceased wife, comprising four children of *Ann Grantham* and three children of *Elizabeth Williamson*, a deceased sister of the testator's wife, namely, the before-mentioned *Susannah Holbrook*, *Eliza Abraham*, and *Mary Williamson*.

The suit was instituted for the administration of the testator's estate, and a question was now raised, upon further considerations, whether the nephews and nieces of the deceased wife of the testator were entitled to take under the trusts by the will declared in favour of the testator's nephews and nieces, as well as, and together with, the testator's own nephews and nieces.

Fooks, for certain of the nephews and nieces of the testator related by consanguinity and having the conduct of the proceedings:—

The primary meaning of the words "nephews and nieces" will include those only who are nephews and nieces—the children of brothers and sisters, and not those who are only related by affinity. This has been held in many cases. In *Wells* v. *Wells* (1), which, it is submitted, is exactly in point, the testatrix gave a specific bequest to his niece *Ann Burman*, and then gave the residue to all his nephews and nieces; and it was held that the nephews and nieces by blood of the testatrix were entitled, to the exclusion of *Ann Burman*. The same principle was decided in *Smith* v. *Lidiard* (2). There are other authorities to the same effect, such as *In re Blower's Trusts* (3), and there are cases shewing that extrinsic evidence will not be received to prove that any other persons are entitled than those who primarily answer the definite meaning of the words used, such as *Ellis* v. *Houstoun* (4). *Megson* v. *Hindle* (5) also supports the contention of the person for whom I appear.

Jolliffe, for the Plaintiff and other nephews and nieces in the same interest.

Norton, for the wife's nephews and nieces:—

The testator by devising property in the first clause to *Susannah Holbrook* and *Eliza Abraham* (who were two of his wife's nieces), and to "my niece *Mary Williamson*," who was also one of his wife's nieces, has himself put a construction upon the words "all my nephews and nieces," and must have intended to include all his wife's nephews and nieces; but if all are not included, *Mary Williamson* cannot, at any rate, be excluded. The case of *Grant* v. *Grant* (1) is strongly in our favour, for there the testator gave property to his nephew *Joseph Grant*; he had a nephew by consanguinity named *Joseph Grant*, and his wife had a nephew of the same name, and it was held, first, by the Probate Court, then by the Court of Common Pleas, and afterwards, on appeal, by the Exchequer Chamber, consisting of six Judges, that extrinsic evidence might be admitted to shew that the wife's nephew was the person intended. In *Sherratt* v. *Mountford* (2) nephews and nieces of a testator's wife were held to take under the words "my nephews and nieces."

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(1) Law Rep. 18 Eq. 504.

(2) 3 K. & J. 252.

(3) Law Rep. 6 Ch. 351.

(4) 10 Ch. D. 236.

(5) 15 Ch. D. 198.

Again, in the case of *Weeds* v. *Bristow* (3), the testator's definition of the words used was taken from the mode in which he used them, for there he gave his residue among his nephews and nieces, and by a codicil he gave £100 to a grand-nephew whom he called his nephew, and it was held that all grand-nephews and grand-nieces were included in the gifts. The same view was taken in the case of *James* v. *Smith* (4). So also, in *Hussey* v. *Berkeley* (5), it was held that the word "grandchildren" in a will comprehended great-grandchildren, because in another part of the will a great-granddaughter was described as a granddaughter.

MALINS, V.C.:—

The question I have to decide is, who are the persons to take under the description of "all my nephews and nieces"; whether only the testator's own nephews and nieces—that is to say, the children of his brothers and sisters—are to take, or whether his wife's nephews and nieces are included in the bequest. Now the testator begins by devising certain freehold property to trustees, who are to pay the rents and profits to *Ann Grantham*, his deceased wife's sister, for life, and after her decease the property is to go to the

(1) Law Rep. 2 P. & M. 8; Ibid. 5 C. P. 380, 727.

(2) Law Rep. 8 Ch. 928.

(3) Law Rep. 2 Eq. 333.

(4) 14 Sim. 214.

(5) 2 Eden, 194.

children of *Ann Grantham*, and *Susannah*, the wife of *W. Holbrook*, and *Eliza*, the wife of *Samuel Abrahams*, and his niece *Mary Williamson*, their heirs and assigns, as tenants in common. The *Mary Williamson* there mentioned was not his own niece, but his wife's niece. Then the testator devises another freehold estate to his trustees upon trust to sell and invest the proceeds, and to pay the interest equally amongst "all his nephews and nieces" for their lives and the life of the survivor of them, and he bequeathed the capital to such survivor of his "said nephews and nieces" absolutely. Then he gives another real estate in a similar manner to his "said nephews and nieces." And the residue of his personal estate is to be divided between "all his nephews and nieces." The first contention is, that the words "all my nephews and nieces" will include his wife's nephews and nieces as well as his own, and in support of that argument the case of *Grant* v. *Grant* (1) is referred to. There a testator gave certain property "to his nephew *Joseph Grant*, his heirs and assigns." The testator had a nephew named *Joseph Grant* who was the son of his brother, and there was another *Joseph Grant* who was the son of his wife's brother. The Court there admitted evidence to shew that the wife's nephew was the person intended to take, and not the testator's own nephew called *Joseph Grant*. The evidence was admitted on the ground of latent ambiguity. Now, if there had been two persons exactly answering the description in the will, then no doubt there would have been a latent ambiguity, to clear up which evidence might have been admitted; but there was only one *Joseph Grant* who answered the description of "my nephew *Joseph Grant*," and there was no ambiguity whatever. I think, therefore, there ought not to have been any inquiry as to which person was intended, and in my opinion the decision was wrong, and I find that the present Master of the Rolls agrees with me in that point, for in *Wells* v. *Wells* (2) he says, "The only difficulty in the case arises from the decision of the Exchequer Chamber in *Grant* v. *Grant*; but that case only decided that the primary meaning of the word 'nephew' included not only the child of the testator's own brother, but also the child of his wife's brother. That is a question not of law but of the English Dictionary, and according to my view of the English language the ordinary meaning of the words 'nephews and nieces' is a man's own nephews and nieces, that is by consanguinity and not affinity, and therefore I am of opinion (as I must decide between the judgments of the two Courts) that the decision of the Court of Appeal in Chancery is to be preferred. That being my view, as it was the view of Vice-Chancellor *Wood* in *Smith* v. *Lidiard* (1), I hold that the nephews and nieces of the testatrix by blood are the only persons entitled to take." The Master of the Rolls, in alluding to the Appeal Court in Chancery, referred to the cases of *In re Blower's Trusts* (2) and *Sherratt* v. *Mountford* (3). Those are decisions going to shew that "nephews and nieces" mean a man's own "nephews and nieces" by consanguinity, and it would be most pernicious to let in a wife's nephews and nieces simply because a testator may have been in the habit of calling them his nephews and nieces.

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(1) Law Rep. 5 C. P. 380, 727.

(2) Law Rep. 18 Eq. 504.

But there is much more to be said in favour of the contention that *Mary Williamson* should be included in the words "my nephews and nieces." In the first clause he describes her as "my niece *Mary Williamson*," and in the following clause the gift is to "my nephews and nieces." If I were unfettered by authority I should come to the conclusion that she was included among the nephews and nieces of the testator, but I find that a contrary doctrine has been laid down in some of the cases cited, and that where such instances have occurred it was under most peculiar circumstances. In the case of *Sherratt* v. *Mountford* the nephews and nieces of the testator's wife were held to be entitled under a gift to "my nephews and nieces living, and the issue, if any, of my nephews and nieces dead before me;" but in that case the testator never had any nephew or niece of his own, nor had he any brother or sister living when he made his will. But where there are nephews and nieces, children of the testator's own brothers and sisters, the others cannot be included. And in *Smith* v. *Lidiard*, where a testatrix having given legacies to her two nieces by name, who were her husband's nieces, and bequeathed the residue of her property to her respective nephews and nieces, it was held that the circumstance of the testatrix having called her husband's two nieces her nieces, did not enlarge the meaning of the words "nephews and nieces" in the residuary gift so as to make it include all the nephews and nieces of her husband, nor even to include the two legatees whom she had called her nieces in the will. In the face of these authorities it is impossible for me to decide that *Mary Williamson* is entitled to share with the testator's own nephews and nieces, and I must come to the conclusion that "nephews and nieces" mean only those who were nephews and nieces by consanguinity.

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(1) 3 K. & J. 252.
(2) Law Rep. 6 Ch. 351.
(3) Law Rep. 8 Ch. 928.

The case of *Megson* v. *Hindle* (1) must, I think, be considered as another authority in favour of what I have now decided.

Solicitors: *Courtenay & Croome; Hughes & Sons; Williams.*

T. W. G.

V.-C. M.
1881
Feb. 22.

BAILLIE *v.* TREHARNE.

[1880 B. 1087.]

Joint Tenancy—Severance—Marriage—Covenant to settle.

By their marriage settlement the intended husband and wife each covenanted to assign and settle any personal estate which should, during the coverture, vest in the wife or in the husband in her right. At that time the wife was entitled, as one of two joint tenants, to personal estate in expectancy on the death of a person who died during the coverture:—

Held, that the marriage and the covenant to settle each operated to sever the joint tenancy.

ELLIN MARIA BAILLIE (then *Ellin Maria Treharne*) was, before the execution of her marriage settlement, entitled to £5000 consols in possession; and under the will of *George Treharne* she was entitled to real and personal estate, in joint tenancy with her sister *Frances E. Treharne*, expectant on the decease of *Frances Royds.*

By an indenture of settlement dated the 19th of April, 1854, made on her marriage with *Hamilton Baillie*, it was declared that the trustees thereof should stand possessed of the £5000 consols upon certain trusts for the benefit of the wife and the husband, and the children of the marriage; and each of them the said *Hamilton Baillie* and *Ellin Maria Baillie* did for himself and herself and his and her heirs, executors, and administrators, covenant with the trustees, their executors, administrators, and assigns, that in case any sum or sums of money, stocks, or funds, or other personal estate exceeding in amount or value the sum of £100, should at any time or times during the intended coverture be given or bequeathed to or in any manner vest in the said *Ellin Maria Baillie*, or in the said *Hamilton Baillie* in her right, then the said *Hamilton Baillie* and the said *Ellin Maria Baillie* respectively, or their respective executors or administrators, would make, do, and execute all such acts, deeds, and assurances as should be necessary for properly assigning or transferring the same into or vesting the same for all the rights and interests of the said *Ellin Maria Baillie*, or of him the said *Hamilton Baillie*, as her husband therein, in the said trustees, in such manner and so that the same might be held by them upon the trusts thereinbefore expressed concerning the said sum of £5000 consols.

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(1) 15 Ch. D. 198.

Frances E. Treharne, one of the joint tenants, died in 1872 intestate, leaving *George M. Treharne* her heir-at-law, and he took out letters of administration to her estate. *Frances Royds*, the tenant for life, died in 1880, and a special case was stated for the opinion of the Court, whether the covenant contained in the marriage settlement operated as a severance of the joint tenancies.

Higgins, Q.C., and *T. Stevens*, for *Hamilton Baillie*:—

It is clear that there has been no severance of the realty; and the only question is whether either the marriage or the covenant to settle operated as a severance of the personalty. In *Co. Litt.* (1) and *Bracebridge* v. *Cook* (2) the personalty was in possession, here it was in reversion, as in *Armstrong* v. *Armstrong* (3), and was never reduced into possession, so that it would not have gone to the husband if the wife had died, and it is not bound by the covenant. Had there been an actual assignment or reduction into possession the case would be different. If marriage alone is a severance, why was *Caldwell* v. *Fellowes* (4) argued at such length on other grounds: *In re Barton's Will* (5).

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(1) 185 b.

(2) Plowd. 416.

(3) Law Rep. 7 Eq. 518.

(4) Ibid. 9 Eq. 410.

(5) 10 Hare, 12.

Field, for *George M. Treharne*, was not called upon.

Cracknall, for the trustees of the settlement.

MALINS, V.C.:—

The question here is whether there has been a severance of a joint tenancy derived under the will of *George Treharne*.

A joint tenancy can always be severed by assignment, and that may be done either by deed, or by operation of law as on marriage by which the personal property of the wife is given to the husband as much as if it was assigned by deed. It is the act of the law which vests in the husband all the property of the wife which comes into possession during the coverture. In this case, at the time of the [marriage the property in question was reversionary, and if it had so continued the right of survivorship would have remained; and on that principle, as I conceive, the case of *Armstrong* v. *Armstrong* (1) was decided. But here it fell into possession. In *In re Barton's Will* (2) the Vice-Chancellor *Turner* referred to and was guided by the rules laid down in *Co. Litt.* (3). *Coke* there says, "that if there be two joint tenants of a lease for years and one taketh husband and dieth, yet the term shall survive. But otherwise it is of personal goods."

I decide, therefore, that the marriage has worked a severance of the joint tenancy in the personalty; and my opinion also is, that on the authority of *Caldwell* v. *Fellowes* (4), the joint tenancy was severed by the covenant to assign. On both grounds I decide that there has been a severance.

Solicitor for Mr. *Baillie*: *C. W. Stevens*.
Solicitors for Mr. *Treharne*: *Bubb & Co.*

(1) Law Rep. 7 Eq. 518.
(2) 10 Hare, 12.
(3) 185 b.
(4) Law Rep. 9 Eq. 410.

C. M.

OUTRAM *v.* MAUDE.

[1880 O. 8.]

V.-C. B.
1881
Jan. 19, 20, 21, 25, 26, 27; Feb. 5.

Prescription—Unity of Possession—Right to Watercourse.

By deed in 1791 *A.* obtained a demise from *B.* of an underground goit or drain to be then constructed in *B.*'s land for the purpose of conducting water from *A.*'s mill so long as an annual rent of £2 2*s.* should be paid by *A.* to *B.*

In 1836 the demise of 1791 was put an end to, and liberty was given to *A.*, who was at that time yearly tenant from *B.* of the land through which the goit ran, to change the goit or drain of 1791, and to substitute a new cut for conducting pure and clean water at the like rent of £2 2*s.*

The new cut was made and used for pure water, and the old goit (as the Plaintiff alleged) continued to be used for foul water.

In 1866 the land through which the goits ran was sold to *C.*, and in 1867 *A.*'s yearly tenancy of the land was determined.

In an action by *A.* in 1879 to restrain *C.* from interfering with his use of the old goit, to which he claimed title by prescription from alleged open and uninterrupted use and enjoyment thereof from 1836:—

Held, that until 1867 *A.* could not acquire an easement in the land of which he was yearly tenant, distinct from the use and enjoyment of such land, as against *B.* his landlord, and accordingly that, assuming the open and uninterrupted user from 1836 to have been proved, he had failed to establish any title by prescription as against *C.*

ACTION to establish the right of the Plaintiffs to the free use and enjoyment of a certain goit, cut, or watercourse, and to restrain the Defendant from stopping up or obstructing such watercourse, and from in any manner interfering with the Plaintiffs' use and enjoyment thereof.

The Plaintiffs and their predecessors in title had since 1775 been in possession, as owners in fee simple, of a house called *Elliston's*, and of lands appurtenant, near *Halifax*. Adjoining the land called *Elliston's*, and separated from it by a private road which formed the western boundary, was a close of arable land called *The Holme*, containing about two acres, now the property of the Defendant. In 1791 it was proposed by *Benjamin Outram*, at that time the owner of *Elliston's*, to erect a mill on his land contiguous to *The Holme*, for working which it was intended that water power should be furnished by a head-goit drawn from a stream called *Blakeburn Beck*, which formed the southern boundary of *The Holme*. By an indenture of the 1st of January, 1791, Mr. *Walker*, the owner of *The Holme*, then in the occupation of *John Smith*, as his tenant, demised to *Outram*, his executors, administrators, and assigns, a part of the close, twenty-eight roods in length and twelve feet in breadth, with liberty to *Outram* to cut up the demised land for the purpose of a cut or drain to conduct the water from the proposed mill, with liberty and authority to bind or fix a dam or weir for the purpose of conducting the water to the said mill against a certain piece of land called *The Little Holme*—to hold the same with the privileges thereinbefore expressed unto *Outram*, his executors, administrators, and assigns, from the 2nd of February then next, for and during such term as the rent thereafter reserved should be well and truly paid—yielding yearly during the said term unto *William Walker*, his heirs and assigns, the yearly rent of £2 2*s*., payable quarterly. It was thereby also provided that if the rent should be in arrear for forty days it should be lawful for *Walker* to enter upon the demised premises, and the cut or drain to block up, and the dam or weir to pull up, and to repossess his former estate, and *Outram*, his executors, administrators, and assigns, and the occupiers of the cut or drain, from thence utterly to expel. The deed contained a covenant by *Outram* to pay the rent, and that he would, immediately after the cut or drain was thrown open, cause the same to be arched over and filled up with earth above the arch to the top, so as to be level with the surface of the close, and leave the same as arable land and clear off all stones and rubbish, and from time to time, when the cut or drain should require cleansing, clean and repair the same and make satisfaction to the occupier of the close for all damage which should be done to the corn growing therein.

Under the deed the goit, cut, or drain known as "the old goit" was made by *Benjamin Outram* under the land demised to him. The mill was built, a manufactory was established, and the business of manufacturing, fulling, and dyeing cloths, was carried on up to 1836. In that year alterations were made at the *Elliston's Mills* which rendered advisable the construction of a goit of larger capacity to carry off the tail water from the water-wheel at the mills in place of the old goit, and thereupon an agreement, dated the 8th of July, 1836, was entered into between *Ann Walker* (niece of *William Walker*, and then owner of *The Holme*) and *Benjamin Outram*, who had then become the occupier of *The Holme*, as tenant to *Ann Walker*, by which it was agreed that upon the signing of the agreement the indenture of the 1st of January, 1791, should be void and of no effect, and should be delivered up to *Ann Walker* to be cancelled, and that this agreement and the new stipulations thereinafter contained should be substituted in lieu thereof, viz., that *Benjamin Outram* should have full liberty to change the line of the course of the cut or drain (therein described) extending from the east to the west end of *Holme Close*, being in fact the old goit, "which close is now in the occupation of *Benjamin Outram*, as tenant to *Ann Walker*," and to carry the same cut or drain in a line indicated.

Of this new goit about 125 yards in length in one continued line were to be open, and eight feet wide at the top, and about sixty-five yards in length in one continued line were to be arched over and filled up with earth above the arch to the top by and at the expense of *Benjamin Outram*, so as to be level with the surface of the said close, and to be used and enjoyed by *Ann Walker*, her heirs and assigns, and her and their tenants, as arable, meadow, or pasture at their discretion; the whole of the soil and freehold of the close, through which the drain was to be cut, to continue the property of *Ann Walker*; and the occupier of a certain farm, his agents or servants, adjoining the open part of the cut or drain, was to have the privilege of washing sheep or wool therein. It was also provided that *Benjamin Outram* should or might from time to time cleanse out or repair such new cut or drain as occasion should require, and clear off from the close all stones and rubbish which might be laid or thrown thereon after the making of such new cut or drain, and also after cleansing out or repairing it; and that he should make reasonable satisfaction to the occupier for the time being of the close for any damage done to the herbage or crops growing on the close occasioned by making or repairing such new drain, or by the conveying away of such stones or rubbish. In consideration of the easements and privileges given to *Benjamin*

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Outram, he, *Outram*, thereby, for himself, his heirs, executors, and administrators, agreed to pay to *Ann Walker*, her heirs or assigns, the yearly rent of £2 2*s.* on the 11th of November in each year.

In pursuance of the authority given by this agreement of July, 1836, *Outram* constructed a new goit through *The Holme.*

In November, 1866, the Defendant purchased *The Holme* from *Ann Walker*, and by his conveyance, dated the 2nd of March, 1867, the close was conveyed to him, "subject to the right (if any) of *Benjamin Outram* to maintain a goit or drain thereunder upon payment of reasonable herbage damages, and to the stipulations respecting the same contained in an agreement dated the 8th of July, 1836, and made between *Ann Walker* of the one part and *Benjaman Outram* of the other part.

In 1867 *Benjamin Outram's* tenancy of *The Holme*, of which he had been in occupation since 1836 as yearly tenant, was determined by the Defendant.

By their statement of claim the Plaintiffs, who were entitled under the will of *Benjamin Outram* to *Elliston's Mills*, alleged that they had for forty-three years and upwards, without any question or interruption on the part of the Defendant or his predecessors in title and with full knowledge of the Defendant, and openly and as of right, conveyed and sent away the foul, dye-stained, and polluted water from their mill through the old goit of 1791, and had in manner aforesaid during the whole of such period used the said old goit for the above-mentioned purposes. They also alleged that they and their predecessors in title had also, for the whole of the period during which they had been owners of *Elliston's* (*i.e.*, from 1775), without any question or interruption and with such knowledge as aforesaid, and openly and as of right and without rendering or making any payment or acknowledgment therefor, conveyed and sent away the water draining and passing from a close or field part of their estate through the old goit or watercourse, or a cut or channel which occupied the site of the said old goit before the construction thereof.

On the 10th of February, 1880, the Defendant stopped up and closed the old goit and thereby prevented the passage of the foul, dye-stained, and polluted water, sewage and drainage through the old goit. The effect of this stoppage was that the foul water had to be discharged through the new goit into the beck at a point above some paper mills, and fouled and polluted the water used by the owners of the paper mills to such an extent that the Plaintiffs were threatened with an action by them.

The Plaintiffs asserted, and adduced evidence for the purpose of shewing, that the old goit had never been closed up until February, 1880, and that since 1836, when upon the construction of the new goit the tail water from the water-wheel commenced to be discharged down the new goit, the dye-stained water and refuse had at all times been discharged down the old goit. Such user by the Plaintiffs of the old goit since 1836 had been open and continuous and as of right, and, as the Plaintiffs believed, with the full knowledge of the Defendant, and previously to his purchase of *The Holme* in 1866 with the full knowledge of his predecessors in title. Moreover, several portions of the old goit were open, and during frosty weather, and particularly when snow was on the ground, the existence of the old goit was clearly indicated by the early disappearance of the frost and snow from that portion of *The Holme* situate over the old goit.

The Defendant, on the other hand, in denial of the right from uninterrupted user since 1836 claimed by Plaintiffs, alleged that as soon as the new goit was completed in 1836 the old goit ceased to be used, and that it was in fact closed up and had not since been used for any purpose. If the Plaintiffs had in anywise used the old goit since 1836 they had done so without the knowledge of the Defendant or his predecessors in title, and secretly and not as of right, and such user had been precarious only. Though aware that the old goit had existed up to 1836, the Defendant stated that he was ignorant until 1874 that it still existed. In that year a horse whilst ploughing in *The Holme* broke through the arch of the old goit and fell into it. At this time, according to the Defendant's case, the old goit was blocked up with refuse and quite dry, no water then flowing through it. The Defendant then, as he alleged, completely filled up the old goit at the place where his horse broke through, and since that time any use by the Plaintiffs of the old goit, even if enjoyed by them from 1836 until 1874 (which Defendant denied), was effectually interrupted.

Sir *H. Jackson*, Q.C., *Nalder*, and *Lockwood*, for the Plaintiffs:—

The deed of 1791 operated as a license to use the old goit so long as the rent reserved continued to be paid. Under the new arrangement and the agreement of 1836, the license thus created was absolutely put an end to, and from that time the use by the Plaintiffs and their predecessors of the old goit, as a channel for carrying away their dye-water, has been perhaps a trespass, and certainly by a title altogether inconsistent with the rights created by the deed of 1791, which were put an end to in 1836. Such use has been continuous, open, and without interruption from 1836 until 1879, when it was wantonly and capriciously interfered with by the Defendant, and therefore from the enjoyment of this easement for forty-three years in the land of the Defendant and his predecessors in title we claim to have established a title under the *Prescription Act* (2 & 3 Will. 4, c. 71). As soon as the new cut was made, the ownership of the soil in which the old goit was made reverted back to Miss *Walker* and became part of her freehold; and as owner of the soil she could have stopped up the drain or obtained an injunction to restrain *Outram* from making use of it for the discharge of dye-water from his mill. *Outram*, therefore, in continuing the use of the old goit after 1836—and we submit that on this point the evidence is conclusive—was a trespasser in point of law, and his trespass with the knowledge and acquiescence of the owners of the soil, who, until the Defendant bought the property, did not think it worth their while to raise any objection, has grown into a right. The Defendant, however, contends that as *Outram* was in occupation as tenant from 1836 to 1867 of the servient tenement as well as of the dominant tenement (*Elliston's Mill*), there has been unity of possession so as to prevent the easement being acquired. But *Outram* was tenant from year to year only; and the *Prescription Act*, s. 8, in extending, under certain circumstances, the period of forty years, which, under sect. 2, gives an absolute and indefeasible title, provides that such extension shall take place when the land has been held for a term of years exceeding three years, not by a succession of yearly tenancies. Being a yearly tenancy only, the landlord was *dominus* of the position and could have turned out the tenant at six months' notice, and thus put a stop to the acquisition of any right by him in the nature of an easement. If it be once shewn that, consistently with the acknowledgment and recognition of the tenancy, the landlord could have stopped him from doing what he had done, then there has been no unity of possession sufficient to prevent the acquisition of this easement by *Outram* as owner of the dominant tenement, and his user has been in the nature of an easement not affecting his tenancy from year to year. Miss *Walker* could at any time after 1836 have stopped up the drain and prevented *Outram* from using it, and yet have left him in full enjoyment of what he had contracted to take, *i.e.*, the agricultural tenancy from year to year of the surface, which was quite distinct from his tenancy of the underground drain, which ceased entirely in 1836. The true test, therefore, is, could this user have been stopped? "The statute could not have meant to confer upon a man a right he in no way required to have conferred upon him, namely, a right to enjoy that which he could not be prevented from enjoying so long as he was the occupier of the piece of land on which the impediment to his light might be raised:" *Ladyman* v. *Grave* (1).

Kay, Q.C., and *Maclean*, for the Defendant:—

The Plaintiffs have not established their right to the easement claimed by them of sending foul and refuse water down the old goit, as unless it can be shewn that it was an easement as long as *Benjamin Outram* was in occupation of *The Holme*, their case must fail.

Until 1836, the only right in respect of the goit enjoyed by the Plaintiffs was under the license granted to them by the deed of January, 1791—the right of sending water down that channel so long as they continued to pay the rent of £2 2*s.* a year reserved by the deed. In 1836 a new agreement annulling and in substitution for that of 1791 was entered into, which gave *Benjamin Outram* the right to cut a new goit through the same piece of land of which he had then become the yearly tenant. The Plaintiffs now claim the easement of turning refuse water through the old goit into the stream by user since 1836. But the right to an easement by user can only be claimed by one who has been

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(1) Law Rep. 6 Ch. 767.

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in the first instance a trespasser in the exercise of that user; and as *Benjamin Outram* was in the occupation of the land, and not merely of the surface, but of the soil down to the centre of the earth—as yearly tenant in 1836, when the user of the old goit without license commenced, he could not have been both tenant and trespasser. No tenant can gain a right against his landlord by the use to which he puts the land during his tenancy, and, on the other hand, the landlord cannot treat his tenant as a trespasser, his only right being by action of waste if the demised land is injured or improperly made use of by the tenant. It is of the essence of an easement, which is a privilege or liberty in the land of another (*Hewlins* v. *Shippam* (1)), that the party claiming it should not have had any interest in the land itself in or over which the easement is claimed during any part of the statutory period of twenty years required by the *Prescription Act* (2 & 3 Will. 4, c. 71), s. 2: *Clay* v. *Thackrah* (2); *Bright* v. *Walker* (3). To entitle the Plaintiffs to the benefit of the easement claimed by them, there must have been an enjoyment of the easement as such, and as of right, openly and without interruption and adversely to the person over whose land the right is claimed for a continuous period of twenty years next before action brought, and unity of possession during all or any part of that period will defeat the right: *Onley* v. *Gardiner* (4); *Daniel* v. *North* (5); *Harbidge* v. *Warwick* (6). *Ladyman* v. *Grave* (7), so far as it contains *dicta* negativing the proposition that the user must be uninterrupted and continuous, and implying that the accruing right to the easement is only suspended during union of possession, is not in accordance with the current of authorities, and should be disregarded. Assuming that the user of the old goit from 1836 down to the present time has been proved, and proved to have been with the knowledge of the Defendant and his predecessors in title—which we deny, and which is negatived by our evidence—the Plaintiffs still have no *locus standi*, having been tenants of the particular close of land through which the old goit

(1) 5 B. & C. 221, 229.
(2) 9 Car. & P. 47.
(3) 1 C. M. & R. 211.
(4) 4 M. & W. 496.
(5) 11 East, 372.
(6) 3 Ex. 552.
(7) Law Rep. 6 Ch. 763.

runs from 1836 until 1867. The possession of the Plaintiffs (as tenants) of the close was the possession of their landlord. Any encroachment by the tenant enures not for the benefit of the tenant, but at the expiration of the tenancy for the benefit of the landlord, and it would be an utter violation of the first principles of the relation of landlord and tenant to suppose that the Plaintiffs could, by the use of the goit during their tenancy, acquire as against their landlord (represented by the Defendant) any easement whatever: *Gayford* v. *Moffatt* (1).

Sir *H. Jackson*, in reply:—

So long as the user was not *clam* or *precario* it is not necessary to shew actual knowledge on the part of the owner of the servient tenement, or that the person claiming the easement has given notice by letter or word of mouth to any one he intended to affect by it. This channel or goit has been used as the drain of *Elliston's Mill* as of absolute necessity, and without interruption for the last ninety years. We agree that no easement can be acquired where there has been unity of possession. But what is the meaning of the phrase "unity of possession?" What is the meaning of the *dictum* that the easement must be claimed as of right; that the possession of the landlord is the possession of the tenant? It turns on this question: Has the landlord put himself in such a relation to his tenant as to prevent himself, consistently with the interest he has given to his tenant, from complaining of the thing done? If upon the terms of the demise it is open to the landlord to object, and if in spite of the landlord's right to object the tenant goes on with the particular act, then the landlord, by acquiescing in the act for the prescribed period, loses his right. In this case, under the stipulations of the deed of 1836, *Benjamin Outram* was bound to discontinue the use of the old goit and close it up, and use the new one in its place. Those stipulations having been disregarded by him he became *eo instanti* a trespasser; he could have been restrained by injunction from using the old goit, and would have had no defence to an action by Miss *Walker* for specific performance of his contract to close it up, and in any action by her would have been estopped from raising his tenancy as a defence.

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(1) Law Rep. 4 Ch. 133.

The use of the two drains was acquiesced in for a length of time sufficient to give the Plaintiffs a title under the *Prescription Act*, and they have thus acquired the easement against their own landlord and all subsequent owners of the soil. In no one of the cases cited upon this point of unity of possession were the arrangements between the landlord and tenant such as to admit of the landlord stepping in and putting a stop to what his tenant was doing. If, however, as here, the landlord at any time after 1836 could have stopped the use by *Benjamin Outram* of the old goit, which was a matter separate and quite distinct from his tenancy of the surface, the doctrine of unity of possession and the decisions thereon cited by the Defendant have no application.

BACON, V.C.:—

After much time has been consumed in the examination of numerous witnesses it appears that the question between the parties litigant is one of law only—and that is, whether the Plaintiffs, who have been, and whose predecessors in title were, for many years in the use and enjoyment of a drain or sewer situate in land of which the Defendant is now the owner, are entitled by law to continue in such use and enjoyment, and whether they are entitled to be relieved against the interruption of such use and enjoyment by the Defendant, who claims to be entitled to stop up the dam, drain or sewer. In determining that question it is in the first place necessary to consider the origin of the right which the Plaintiff asserts, and the nature and condition of the sewer or drain, and the land through which it passes, and the adjacent property.

[His Lordship, after stating the provisions of the deed of the 1st of January, 1791, continued :—] This deed was afterwards put an end to, but it shews more distinctly than can any more modern evidence what was the meaning of the parties contracting, and what was the subject of the contract then entered into. And I gather from that instrument that no mill was then existing, that the scope and object of the instrument was to enable *Outram* to conduct from the dam or weir the water required for working the mill-wheel into and across *Walker's* field in a cut or drain of which the length and breadth and mode of construction are distinctly expressed, and that upon default of payment of the rent *Walker* was to be at liberty not only to stop up the cut or drain, but to pull down the dam or weir. But I do not find in this deed that any mention was made, nor have I any materials from which it can be inferred that there was any intention by either of the parties to provide for any drainage or sewerage from the mill, which does not appear then to have been in existence, or any other drainage than that of the water which might be drawn from the dam or weir.

Under this deed the cut or drain appears to have been made. The mill was built, a manufactory was established, and the business of manufacturing, fulling, cleansing and dying cloths was carried on up to the year 1836. The water from the dam or weir was carried through and across the mill-yard and premises of *Outram*, and over the private road of *Outram*, which formed the western boundary of *The Holme*, and into the cut or drain mentioned in the deed of 1791, and there is every reason to believe that after the mill was built and the manufactory established, together with the water from the dam or weir, the refuse and other water used in the process of manufacturing, including the dye-water, passed into the same cut or drain. In 1836 it appears to have been determined and agreed between the parties interested that a change should be made in the manner of conducting the water from the dam or weir into *The Holme*, and accordingly an agreement under the hands and seals of the parties was executed.

[His Lordship, after stating the provisions of this agreement, said:—] Now, it is to be observed upon this instrument that thereby the deed of 1791 is wholly abrogated, and for all purposes of legal operation as much at an end as if it had never had a beginning, and that the only contract between the parties relating to the subject then was the agreement of 1836; that at the time of its execution *Outram* was Miss *Walker's* tenant of *The Holme*, and also occupier of the adjoining mill and premises, that the agreement is substituted for the cancelled deed, that the agreement only confers upon *Outram* liberty to change the cut or drain (then existing and shewn upon the annexed plan) and to carry the new cut or drain in the line marked upon the same plan, that instead of the power of the lessor or owner in the events mentioned

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in the deed to pull up and abolish the dam or weir, it is to remain and continue as at present, and the new cut or drain is to be so constructed as to give to Miss *Walker*, and to her tenant of some adjoining land, the privilege of washing sheep or wool in the uncovered part of the cut as prescribed. It would, I conceive, be impossible to construe this instrument so as to hold that it conferred upon *Outram* any other right than the liberty of changing the then existing cut or drain for the new cut or drain, the course and dimensions and mode of construction of which are carefully and explicitly prescribed. Not only is there no word in the agreement relating to any drain from the Defendant's works, nor indeed to any other drain than that which had been formed for conducting water from the mill-dam, and which is thenceforth to be used for so conducting such water, as that it should be accessible for the purpose of washing sheep and wool; in other words, pure and clean water. The deed of 1791 and the agreement of 1836 are in evidence, and the facts, so far as they appear and are stated in those instruments, are not in dispute.

The Plaintiffs, who are entitled under the will of *Benjamin Outram*, and are owners of the mills and manufactory, and of the house and lands adjoining, called by the general name of *Elliston's*, claim a possessory right to the use of the cut or drain mentioned in the deed of 1791, and to the right of discharging through it and across *The Holme* the drainage and dye-water from their mills and other premises.

There has been a long examination of many witnesses upon facts which appear to me to be immaterial, considering the question of law upon the decision of which the rights of the parties are to be determined, but which facts I shall advert to for the better appreciation of the matters which have been argued.

The Plaintiffs have proved that, before and since the year 1836, the drains from the Plaintiffs' mill have been connected with the cut mentioned in the deed of 1791. The Plaintiffs' claim being founded upon an alleged possession for forty-three years, must be taken to commence in 1836. It is established in evidence by the Plaintiffs that at or shortly after that period the new cut, the subject of the agreement of 1836, was made by *Benjamin Outram* in the line and in the manner stipulated for in that instrument.

and that it has been ever since, and is still, used as the means of conducting pure water from the mill-wheel. *Benjamin Outram* was and continued to be the yearly tenant and occupier of *The Holme* until 1867. The Plaintiff, *Edmund Outram*, and several of his witnesses, have deposed that from 1836 to the present time the course of the old cut in *The Holme* has been distinctly indicated and plainly visible on the surface of the land by the melting of snow in the winter and by the parching and discoloration of the herbage in the summer, occasioned by the heated dye-water flowing from the Plaintiff's mill and by the steam which has been occasionally evolved from the same water. On the part of the Defendant, he and several of his witnesses, all well acquainted for many years with the close, have directly contradicted these statements. They deny in explicit terms that there does exist, or ever has existed within their knowledge, any visible trace or indication of the course of any such cut or drain in *The Holme*. The conflict of testimony upon that fact is so plain and positive that I should have found it difficult to arrive at any satisfactory conclusion on the subject if it had been essential to the determination of the question before me; but, inasmuch as it appears to me to be immaterial to that question, I pass from it without any further observation. The Defendant has denied any knowledge of the old cut in *The Holme* anterior to 1874, or rather 1876, when he became aware of it by the fact that one of his horses ploughing broke a part of the arch and fell into the cut. The Plaintiffs assert that at the sale by auction in 1866, when the Defendant became the purchaser of *The Holme*, the late *Thomas Outram*, in the presence and hearing of the Defendant, claimed to have a right to a drain other than and besides the new cut over *The Holme*. [His Lordship, after referring to the evidence on this point, continued:—] Upon the Defendant's horse having broken the arch and fallen partially into the cut, the Defendant filled up the hole thus made, the consequence of which was that the flow of water was impeded, and after a time some of the contents of the drain were forced back into the cellars of the Plaintiffs' warehouse. At Whitsuntide, 1879, the Plaintiffs employed men to clean out the old cut, and a large quantity of refuse from the Plaintiffs' dye-works, more or less solid, was extracted. In January, 1880, the Defendant closed up the old goit in *The Holme,* and thereby prevented the further passage of refuse, dye-stained and polluted water from the Plaintiffs' mills. Very shortly afterwards the Plaintiff, *Edward Outram,* entered upon *The Holme,* removed the obstruction which the Defendant had placed in the same goit; and thereupon this action was brought.

Now, these being the facts which have been brought forward in the evidence which has been adduced, the result is that the question to be decided is one which is wholly independent of that evidence, so far as it is undisputed, and wholly unaffected by the contradictions which occur in the course of that evidence. It has been argued on the part of the Plaintiffs that the possession and user by them and their predecessors of the old cut or drain for a period of more than forty-three years, openly and as of right, without objection or interruption by the Defendant or his predecessors in title, has conferred upon the Plaintiffs a right to continue such user and enjoyment. And in support of this contention the Plaintiffs rely upon the provisions of the *Prescription Act* (2 & 3 Will. 4, c. 71). They rely further upon the construction of the deed of 1836, and not disputing that that instrument put an end to the right which had been enjoyed under the deed of 1791, they insist that their former right having come to an end in 1836, they were from that time trespassers as regards the old cut, but that, having continued thenceforward in such use and enjoyment without interruption for more than forty years, their trespass has conferred upon them a right which is now absolute under the statute.

It would at least be strange, and hardly consonant with any principle of reason or right, if such a contention could be maintained. Nothing is more clearly established than that a person to whom land is demised cannot by its use and enjoyment acquire an easement in it, distinct from the use and enjoyment of such land, against his landlord; and it is further clearly established law that the tenant cannot acquire any such right while a unity of possession in the subject demised and in the easement claimed subsists in the same person. Many cases have been cited in the course of the argument which have no distinct resemblance to the facts here present, but which contain declarations of the principles which I think determine the questions of law in issue in this case. And there is no decision to be found, so far as I am aware, in which the principles I have last adverted to are in the slightest degree questioned. On the contrary, those principles are in terms stated and repeated, not only for the purpose of supporting the judgments pronounced, but as the familiar recognition of indisputable rules and axioms of law. To bring the case within the *Prescription Act*, the alleged enjoyment of the easement must have been an enjoyment "as of right," and proof that there was during such enjoyment unity of possession is as much a denial of that allegation as the occasional asking permission would be: *Onley* v. *Gardiner* (1). No action of trespass could have been maintained by the lessor against the tenant during the demise. No action for an injunction restraining him from the use of the old drain could have been maintained by the landlord against the tenant during the continuance of the demise. It is true that the landlord might at any time have determined the demise upon lawful notice, but he was under no obligation to resort to any such, or any other remedy, even if he had known of the unauthorized use of the drain, since he must be taken to have known also that whenever and by whatever means the tenancy was determined, the use of the drain must have determined with it. Nor do I think that the construction of the deed of 1836 is open to any doubt. The tenant under that instrument cannot be entitled to more than the landlord grants to him. All that is granted to him is liberty to change an existing drain—not to make a new drain and to retain the old one, but to make a new drain, and one which should conduct pure water only. That the drain made under the old grant in 1791 was for the conduct of water "from the mill," must, I think, be held to mean water only, river water, and not polluted water from whatever might be manufactured in the mill. But even if this were doubtful, as I think it is not, the deed of 1836, which extinguished and put an end to the license given by the elder grant, and substituted for it a new license to do a definite thing, is too clear to be questioned. No doubt a tenant may lawfully make the best use he can for his own benefit of the thing demised, but the right to do so must come to an end when his tenancy is determined. The tenant's duty, when that period arrives, is to give up the subject demised in its entirety. To hold the contrary would be subversive of all reason and justice. The law is clear that the tenant can in no case, and under no circumstances, establish such a right as acquired during his tenancy against his landlord, and that no easement can be acquired while unity of possession exists in the land demised and in the easement claimed.

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(1) 4 M. & W. 496.

Action dismissed with costs.

Solicitors: *Layton & Jaques*, agents for *Franklin & Humphreys, Halifax*; *Ullithorne, Currey, & Villiers*, agents for *Lancaster & Wright, Bradford.*

F. G. A. W.

ROYAL SOCIETY OF LONDON AND THOMPSON.

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1881
Feb. 26;
March 4.

50 L.J. D59
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Royal Society—Voluntary Association—Charity—Sale of Land—Charitable Trusts Acts, 1853, *s.* 62, *and* 1855, *ss.* 29, 48.

The *Royal Society*, a voluntary association of learned men founded in the reign of King *Charles* II., in 1732, purchased, out of moneys arising from the subscriptions of the members, real estate at *Acton*, and in 1881 sold part of it. An objection was taken by the purchaser that the consent of the Commissioners under the *Charitable Trusts Acts*, 1853 (16 & 17 Vict. c. 137, s. 62) and 1855 (18 & 19 Vict. c. 124, s. 29), was necessary, on the ground that the society was an endowed charitable institution:—

Held, that, the estate having been purchased out of the moneys arising from the voluntary contributions of members which could be by the society legally applied for such purpose, the society came within the exemptions of the 62nd section of the *Charitable Trusts Act* of 1853, and the 48th section of the Act of 1855, and that, notwithstanding the 29th section of the Act of 1855, the society had power to sell the estate without the consent of the Commissioners.

THIS was a summons, adjourned into Court, taken out by the *Royal Society* under the *Vendor and Purchaser Act*, 1874, to consider the purchaser's requisitions on title, and the vendors' answers, and asking that, inasmuch as the land contracted to be sold was the private property of the *Royal Society*, it might be declared that the society had in respect of such land power under their Royal charters to sell and dispose of it, and that the sanction of the Charity Commissioners to the sale being made was unnecessary.

The evidence of the treasurer was that the *Royal Society* originated in the voluntary association of a number of learned men during the time of the Commonwealth, and was subsequently incorporated under King *Charles* II., who granted charters on the 15th of July, 1662, the 22nd of April, 1663, and the 8th of April, 1669. Under the charters the society had general powers to purchase, hold, and grant lands, goods and chattels, and to sue at its own will and pleasure, and be sued. They contained regulations as to the constitution of the society, and full powers were thereby given to the society to make its own laws, statutes, and ordinances, so long as they were consistent with the laws and statutes of the realm.

A Royal license was granted to the society by King *George* I., authorizing the society to purchase, hold, and enjoy to them and their successors for ever, in mortmain, lands of the yearly value of £1000.

The funds of the society consisted of—money contributions by the members, including life compositions; capital funds and property belonging to the society for its own purposes; rents, profits, and interest thereon; and moneys or property given or bequeathed to the society upon specific trusts. The society was strictly a voluntary association. All its members were elected by ballot, as in an ordinary club, subject to annual payments, or to a life subscription in lieu thereof. No one outside the society could claim admission to it, nor were there any duties which the public, as distinguished from its own fellows or members, could call upon the society to perform. The public had not any right of access to the meetings, or premises, books, or instruments of the society, or any right of supervision over it, or over the expenditure of its own moneys.

A portion of the property of the society consisted of lands situate at *Acton*. The property was purchased by the society in the year 1732. At that time the funds belonging to the society in its own right having, since 1717, accumulated, it was thought desirable to invest them in land in the neighbourhood of *London*; and a dwelling-house and forty-eight acres of land were accordingly bought for the sum of £1600, and paid for out of their own funds. The indenture of sale of the estate to the society was a simple conveyance of the fee simple without any declaration of trust.

In 1772 the society sold and conveyed an acre of the land, and in 1774 the house and three acres were sold, and in 1792 another plot was sold. Within the last twenty or thirty years other parcels of the land had been sold to railway companies, to the Ecclesiastical Commissioners, and to private persons, without any question being raised as to the power of the society to sell and convey its own lands. By these sales the estate had become reduced to about thirty-two acres. All the purchase-moneys received from the sales had been carried to the general account of the society. In recent years several small parcels of land at

Acton had been purchased by the society out of the same funds with a view of improving the property.

The treasurer also stated that he believed that at the time when the original purchase was made the society had not accepted any trust fund which it now administered, except a certain fund called "*The Copley Medal Fund*," which was originally included in the general investments of the society, but was afterwards carried over to a separate account. There were other funds held by the society for special purposes, but no part of them was applied in payment of the purchase-money of the estate; though they were in existence since 1723, they were in no way connected with the estate at *Acton*.

Recently the society contracted to sell about thirty-two acres of the land to Mr. *Thompson* for the sum of £32,250. The contract in effect was that the society had power under their charters, or one of them, to sell and dispose of the property, but the question whether or not they had such power should be deemed to have been raised by the purchaser as an objection on title, and should be referred to a Judge of the Court as provided by the 37 & 38 Vict. c. 78, s. 9, and if such Judge should decide that the society had not power to sell, and the society should not within the time limited think fit to obtain such power, the contract should be annulled, and the deposit should be returned to the purchaser, but without interest.

The purchaser made requisitions on the title asking, in effect, whether the property, or any part thereof, or the money applied in payment of the purchase-money for any part, formed part of any and what endowment, within the meaning of the Charitable Trusts Acts, and whether the society held it, or any part of it, upon any and what trusts; assuming that the society's charters authorized a sale, it was doubted whether the consent of the Charity Commissioners was not necessary under the Acts, and the purchaser required such consent to be obtained. If the point was submitted to the Court, evidence as to the sources of the funds expended in the purchase of the land was asked for. The society stated that neither the land nor the money applied in payment for it formed part of any endowment, nor was it held upon any trusts, and the society proved that no special funds could in the books be indentified as having been laid out in the purchase of the land. On these requisitions and answers the point of law was submitted to the Court: whether, assuming that the land was purchased out of voluntary contributions, the consent of the Charity Commissioners to a sale was necessary under the Charitable Trusts Acts.

Hastings, Q.C., and *Ingle Joyce*, for the summons:—

It is submitted that the *Royal Society* has power to sell and dispose of this property without asking for the consent of the Charity Commissioners. The society is strictly a voluntary one. The conveyance of the property was in fee to the society, as a corporation, simply, the purchase-money being derived from voluntary contributions. The case comes clearly within the 62nd section of the *Charitable Trusts Act* of 1853 (16 & 17 Vict. c. 137), which enacts that the Act shall not extend to the Universities, and certain ecclesiastical establishments, institutions or societies, "or any institution, establishment, or society for religious or other charitable purposes, or to the auxiliary or branch associations connected therewith wholly maintained by voluntary contributions" . . . "and where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment, the powers and provisions of this Act shall with respect to such charity extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions, and the application thereof, and no donation or bequest unto or in trust for any such charity as last aforesaid of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the said board, or the powers or provisions of this Act: and no portion of any such donation or bequest as last aforesaid, or of any voluntary subscription which is now or shall or may from time to time be set apart or appropriated and invested by the governing or managing body of the charity for the purpose of being held and applied or expended for or to some defined and specific object or purpose connected with such charity in pursuance of any rule or resolution made or adopted by the governing or managing body of such charity, or of any donation or bequest in aid of any fund so set apart or appropriated for any such object or purpose as aforesaid, shall be subject to the jurisdiction or control of the said board, or the powers or provisions of this Act." But if there should be any doubt entertained, then the case is governed by the decision in *Governors for the Relief of Poor Widows of Clergymen* v. *Sutton* (1). The question really arises, however, upon the construction of sect. 29 of the *Charitable Trusts Amendment Act,* 1855 (18 & 19 Vict. c. 124), which enacts that "it shall not be lawful for the trustees or persons acting in the administration of any charity to make or grant otherwise than with the express authority of Parliament under any Act already passed, or which may hereafter be passed, or of a Court or Judge of competent jurisdiction, or according to a scheme legally established, or with the approval of the board, any sale, mortgage, or charge of the charity estate, or any lease thereof in reversion after more than three years of any existing term, or for any term of life or in consideration wholly or in part of any fine or for any term of years exceeding twenty-one years." By sect. 66 of the Act of 1853, it was enacted that "charity" shall mean every endowed foundation and institution coming within the meaning of the 43 Eliz. c. 4, and that "endowment" shall mean and "include all real estate and any charge thereon or interest therein, and all personal estate which shall be held in trust for any charity or for all or any of the objects or purposes thereof;" and by sect. 47 of the Act of 1855, it is provided that nothing in the Act shall extend to any of the cases which by sect. 62 of the Act of 1853 are excepted from the operation thereof; and by section 48 of the Act of 1855, that "charity" shall include every institution . . . . endowed for charitable purposes, but shall not include any charity or institution expressly exempted from the operation of the Act of 1853.

In order, therefore, that the Acts should have application here, the society must not only be a charity, but an institution endowed for charitable purposes. It must have property of some kind or another, an endowment from which income is derived to be applied to purposes of charity, *i.e.*, there must be a permanent appropriation of capital to the institution which takes the income.

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(1) 27 Beav. 651. 6 Jur N S 84

In the case before the Master of the Rolls, the decision turned upon the meaning of the word "endowment" in the 62nd section, and it was held that it meant a gift made for some specific or particular purpose or trust; and that the investment by a charity of its voluntary contributions in land or permanent securities could not convert such investment into an endowment. Here, however, the evidence shews that the *Royal Society* is not an institution endowed for charitable purposes, but that it is supported by the voluntary subscriptions of its members; and, though admitting, for the purpose of argument, that the society, if merely a charity, would within the meaning of the 29th section require the authority of the Court for a scheme, or the consent of the Commissioners to a sale, yet it is submitted that by the 62nd section the society is clearly exempted. There are the 24th and 26th sections of the Act of 1853, which apply to charities and to express trusts affecting charities, but they cannot apply to this society, as this land was conveyed to it in fee without any trust. It must be borne in mind that the two Acts of 1853 and 1855 are to be construed together, and that any provisions in the former inconsistent with any in the latter are repealed. Reading the clauses as if they were in one Act, the 29th section is nothing more than an enlargement of the provisions in the Act of 1853. The society is within the 62nd section, and is, it is submitted, exempted from any interference on the part of the Commissioners.

W. Pearson, Q.C., and *Methold*, for the purchaser:—

The question is whether the property which has been sold to Mr. *Thompson*—a willing purchaser—was purchased by the society out of funds which were subject to any particular trust, or out of funds which the society could apply as income. If the funds were the former, then they came under the provisions of the Charitable Trusts Acts of 1853 and 1855, and there can be no sale of the property without the consent of the Charity Commissioners. It is now admitted that there is no record which connects any of the funds invested in the purchase of the property with a special trust, and assuming that the property was purchased out of voluntary contributions, the question is, what is the law in regard to the power of the society to sell it. This is a charitable institution

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within the meaning of sect. 48 of the Act of 1855, and that was decided in the case of *Beaumont* v. *Oliveira* (1).

The meaning of the word "endowment" as used in the Act of 1853, sects. 62 and 66, has been explained by the Master of the Rolls in the case referred to of *Governors for Relief of Poor Widows of Clergymen* v. *Sutton* (2), but that case is distinguishable from the present.

By sect. 24 of the Act of 1853, no restraint was placed upon a charity in dealing with its property, but by sect. 29 of the Act of 1855 the trustees or persons acting in the administration of any charity are forbidden to make any sale or mortgage of the charity estate without consent properly obtained, and in the case before the Master of the Rolls, where the decision turned upon the meaning of the word "endowment," no reference was made to the effect of the 29th section, and, therefore, it is submitted that it goes far beyond the Act of 1853, and positively forbids the trustees from selling without consent of the Commissioners. Sect. 48 of the Act of 1855 states that "charity" shall not include any institution expressly exempted from the operation of the Act of 1853, and the question whether this society is or is not within the operation of sect. 29, must be considered with reference to that section, to see whether it is expressly exempted. If it be not, then it clearly comes within the 29th section, and no sale can be made without such consent. The *Royal Society* is an institution not mentioned in the Acts, and therefore it comes within the operation of them.

Hastings, in reply.

HALL, V.C. :—

The sections of the statutes which have been referred to are, I think, capable of being reconciled. The Act of 1855 must be read in connection with the Act of 1853, which, in sects. 24 and 26, contains provisions in regard to applications by trustees acting in the administration of any charity, and land belonging to the charity, to the Charity Commissioners for the sale or exchange of

(1) Law Rep. 4 Ch. 309.

(2) 27 Beav. 651. 6 Jur N S 89

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such land, and for the investment of the money arising from any such sale, or by way of equality of exchange for the benefit of the charity, and the sales authorized by the Commissioners were to have the same validity as if they had been authorized by the express terms of the trust affecting the charity. Those were merely enabling provisions, and then comes sect. 62, which has been so fully commented upon, which defines and limits the extent to which the statute is to be applied. It is a section containing many exceptions from the operation of the Act, and so far as regards the *Royal Society* and this land, the words of exemption are, that "where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment, the powers and provisions of this Act shall, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary contributions and the application thereof." That provision is in effect an exemption of this charity from the operation of the Act, except as to endowments in which purposes of the charity are particularly specified; so that, as regards this land which was purchased out of moneys provided by the voluntary contributions of the members of the society, the charity is exempted from the operation of the Acts, whatever may be the effect or operation of them in reference to the income of the society, treating it as a charity. So much for the Act of 1853. Then comes the Act of 1855, which it is enacted by sect. 1 shall be construed with the principal Act of 1853, excepting that any provisions of that Act which are inconsistent with the Act of 1855 were thereby repealed, and the question arises whether the language of sect. 62 of the Act of 1853 is inconsistent with the provisions in the Act of 1855, and is repealed so far as the provisions of that Act, which have been particularly referred to, are concerned; that is to say, the 29th section, which is a negative clause prohibiting, except with the authority of Parliament, or of a Court, or with the approval of the Commissioners, "any sale, mortgage, or charge of charity estate." The words "charity estate" are very large, but looking at the enabling provisions of the Act of 1853, was it the intention of the Legislature, by sect. 29, to take away altogether the exemption which is contained

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in sect. 62 of the Act of 1853? If as regards sect. 29 the Act of 1855 stopped with it, there might be an important question to be discussed and considered, but there is sect. 48 of the same Act, which enacts that in the construction of both Acts the word "charity," the operative and important part of the clause, "shall not include any charity or institution expressly exempted from the operation of the Act of 1853." If I am right in holding that the society is exempted by sect. 62 so far as this land, which was purchased out of voluntary contributions, is concerned, I must hold that it comes within sect. 48 of the Act of 1855, and is exempted from the operation of both Acts. Being, as I hold, exempted by sect. 62 of the Act of 1853 and sect. 48 of the Act of 1855, the 29th section of the latter Act is, as regards this land, inoperative. In my opinion the Legislature would have adopted a more precise provision than any in the Acts if it had been intended to sweep away what I consider are exemptions in the Act of 1853, and would, by the Act of 1855, have put fetters upon the operation of the Act of 1853, which up to that time was not, as it appears to me, fettered at all. It was no doubt meant that an estate which was purchased by a charitable institution out of the voluntary contributions of the members of it, should be left under their control, because the estate was not in substance a "charity estate," though it might be considered technically that the institution was a charity within the meaning of the *Statute of Mortmain*, inasmuch as certain property was thereby prohibited from being given to it. A case which was before Lord *Romilly* has been cited. It was a special case, and the 29th section of the Act of 1855 was particularly referred to, and though it does not appear to have been commented upon in the judgment, which was given upon the construction of the 62nd section of the Act of 1853, I think there must have been an argument founded upon it. It could hardly have been passed over by counsel, and I do not think that the weight of the decision arrived at by Lord *Romilly* was weakened by the fact that the 29th section was not noticed by him.

The order will be in these terms:—

It having been proved to the satisfaction of the Court that the estate at *Acton* agreed to be sold was acquired by the *Royal Society* out of property which might

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be legally applied by such society as income, and did not form an endowment within the meaning of the Charitable Trusts Acts of 1853 and 1855; therefore, the Court declares that notwithstanding the 29th section of the Act of 1855, the *Royal Society* has power to sell the same estate without the consent of the Charity Commissioners.

Solicitors: *Few & Co.; Bolton, Smith, & Co.*

T. F. M.

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1881
April 2.

In re BRETON'S ESTATE.
BRETON *v.* WOOLLVEN.

[1880 B. 4244.]

Gift of Furniture and Articles to Wife by Letters—No Declaration of Trust—Subsequent Will of Husband—Wife not entitled to the Gift.

21 Ch. D. 661-6

A husband, by three letters written and signed by him and handed to his wife, gave her furniture and other articles for her sole and absolute use. He afterwards made his will, bequeathing certain legacies and making other dispositions of his property, and giving the residue of it to trustees in trust for his wife for life with remainder to six nieces absolutely. The furniture and other articles were at the time of the husband's death in the house which had been occupied by him and his wife, and the whole had been used by them in the ordinary way:—

Held, that the furniture, &c., formed part of the husband's estate.

Baddeley v. *Baddeley* (1) and *Fox* v. *Hawks* (2) observed upon, and *Milroy* v. *Lord* (3) followed.

FREDERICK BRETON, who died on the 7th of June, 1880, by his will, dated the 8th of August, 1878, appointed two executors and trustees, and after bequeathing certain pecuniary legacies, and making a specific bequest to the widow of a late brother, and specifically devising certain freehold property, bequeathed all the residue of his property and effects to his trustees upon trust at their discretion to continue them or to make other investments of the moneys which were vested in them, and to permit his wife to receive the income of his residuary estate and the investments during her life, and after her death, as to the same residuary estate and the income, upon trust for his six nieces in equal shares.

(1) 9 Ch. D. 113.
(2) 13 Ch. D. 822.
(3) 4 D. F. & J. 264.

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The testator had no real estate not specifically devised, but his personal estate not specifically bequeathed was of the value of about £22,000.

The testator intermarried with the Plaintiff in January, 1868. At that time she was possessed of certain articles of jewellery of her own, and on the occasion of the marriage, and subsequently, her husband gave her many other articles of jewellery: and all these articles she always retained and had sole possession and used and wore as she pleased.

The testator having previously purchased some furniture, on the 22nd of April, 1868, wrote and handed to his wife the following paper:—

"This is to certify that there being now at Messrs. *Maple & Co.*, 145, *Tottenham Court Road*, one hundred pounds worth of furniture belonging to me, I give the same to my dear wife *Agnes A. Breton*, absolutely and unreservedly, for her own use and benefit.

"*Haxell's Hotel, Strand, London,* *Fredk. Breton,*
"April 22nd, 1868. Major Rl. Wilts Militia."

The testator having purchased some plate and plated articles, wrote to the Plaintiff thus:—

"*London*, June 1st, 1868.

"My dearest Wife,—I this day make you a present of the plate, &c., now at *Mappin & Webb's*, and which they are taking care of for me, for your sole use and benefit. The sum I paid for it is £59 7*s*. 10*d*.

"Ever yr affecte husband,
"*Fredk. Breton.*"

The testator and his wife subsequently hired a house at *Forest Hill*, where they went to reside, and thereupon the furniture, plate, and plated articles were removed thither. Other furniture and household goods purchased by or belonging to the testator were placed in the same house, and on the 18th of June, 1868, he wrote and handed the following to the Plaintiff:—

"My dearest Wife,—Having previously made over to you for your sole use and benefit a certain amount of furniture, plate, &c., I now present you with everything, furniture, linen, &c., plate, china, and glass, and all jewellery now belonging to me at No. 1,

Dulwich Villas, Devonshire Road, Forest Hill. All this to be yours and yours only from this date, June eighteenth, 1868. This gift from Yr ever affecte husband,
"*Fredk. Breton.*"

The testator and his wife subsequently went to reside in a house in the *Belvedere Road*, where they lived at the time of his death. To that house all the furniture, plate, and plated and other articles and goods were taken from the house at *Forest Hill.* While the testator and his wife resided together at the two houses the articles mentioned were used in the ordinary way, and from time to time various additions were made thereto by the testator; but during his life he always, as alleged, spoke of all the furniture and other articles and goods, and the said additions thereto, as being the sole property of his wife, and often referred to the useful provision for her comfort which she would have therein and by means thereof after his death.

The trustees and executors having insisted that all the said jewellery, furniture, plate, and plated and other articles and goods, and the said additions thereto, formed part of the testator's estate, the widow brought this action to have it ascertained and declared whether the same, or any and which of them, or any and what parts thereof, belonged to her or formed part of the testator's estate; and if necessary an administration of the trusts by the Court.

At the hearing the executors did not claim the articles of jewellery.

W. Pearson, Q.C., and *Renshaw*, for the Plaintiff:—

It is submitted that by these paper writings the husband constituted himself a trustee of the articles mentioned for his wife. There is a great difference between the cases of a gift by a husband to a wife, and of a gift by any person to a stranger. In the latter there must be a transmission of the legal interest, so that from words of present gift a trust cannot be inferred; but in the case of husband and wife it is different, because, if there were a complete gift by the former to his wife, the legal interest would remain in him.

It is matter for presumption that he knew the law, and that

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he intended to effectuate his object in this way—*i.e.*, that he constituted himself a trustee for his wife. It is not necessary to use any technical words, as any which shew that the donor meant at the time of making the gift to divest himself of the beneficial interest in the property would be sufficient to create a trust: *Grant* v. *Grant* (1). A voluntary deed whereby a husband settles and assigns property to his wife, as though she were a single woman, operates as a valid declaration of trust which the Court will carry into effect: *Baddeley* v. *Baddeley* (2); *Fox* v. *Hawks* (3). The decision in *Richards* v. *Delbridge* (4), where there was a voluntary gift to a nephew, and the words used were inconsistent with an intention to declare a trust, is distinguishable. Here, looking at all the circumstances of the case, there ought to be a declaration in favour of the wife of the furniture and other things claimed by the executors.

Cozens-Hardy, for the Defendants, the trustees, and

Hastings, Q.C., and *H. Greenwood*, for the Defendant, the niece, were not called upon.

HALL, V.C.:—

I am unable to support this gift to the Plaintiff, the wife, as a trust declared by her husband in her favour. I am very sorry for it, because it is a monstrous state of the law which prevents effect being given to such a gift. I think that the difficulty in the case is occasioned by two or three of the decisions which have been referred to, and which seem to favour the contention that these paper writings can be supported as a declaration of trust by the husband in favour of his wife. It was submitted that the husband must be taken to have intended, knowing what the law is, to constitute himself a trustee for her, that being the only way of giving effect to the paper writings, *i.e.*, as other trustees were not appointed, he must be held to have constituted himself a trustee. That argument appears to me to come to this, that in every case of an imperfect gift on the part of the alleged donor, if the gift be not effectual by reason of an incomplete transfer of the property from the alleged donor to the intended donee, or to some person who is to be a trustee for the intended donee, the Court must give effect to the donation by holding that the alleged donor was a trustee, as it must be considered that he knew the law, and that if he did not effectuate his object in the one way in which it would have been valid, it must be done in another. But in truth, in the one case as well as in the other, whether a wife or a stranger be the object of the gift, it is manifest from the transaction taken by itself that the alleged donor was mistaken as regards the proper and legal mode of effectuating that which he intended to do. It is plain that the husband was mistaken, and it is not necessary to impute to him that he meant to make the gift in an ineffectual way. Looking at the documents, they are a contradiction of any intention on his part to do that.

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(1) 34 Beav. 623.
(2) 9 Ch. D. 113.
(3) 13 Ch. D. 822.
(4) Law Rep. 18 Eq. 11.

The case of *Grant* v. *Grant* (1) was that of a gift to a wife, and if the late Master of the Rolls had based his judgment on that ground, supporting it as being a special and peculiar case, and creating a different law as applicable to husband and wife in every case, I should have nothing more to do than to follow that decision. But it is plain, from the reasons given for the decision, that it was meant to be applicable to every other case of the kind, and not merely to that of husband and wife. No other cases of a gift by a husband to his wife have been referred to excepting the two recent decisions of Vice-Chancellor *Malins* in the case of *Baddeley* v. *Baddeley* (2) and of Vice-Chancellor *Bacon* in the case of *Fox* v. *Hawks* (3). As to the former case, I observe that Vice-Chancellor *Malins* said that the law was correctly stated in the case of *Grant* v. *Grant*, and that he was not disposed to disagree with the judgments in *Richardson* v. *Richardson* (4) and in *Morgan* v. *Malleson* (5), notwithstanding the remarks of the Master of the Rolls in the case of *Richards* v. *Delbridge* (6). That being so, there is, as Vice-Chancellor *Malins* seems to have meant there should be, a clear difference of opinion between himself and the Master of the Rolls upon this question, because he adopted the decisions in the two cases of *Richardson* v. *Richardson* (1) and *Morgan* v. *Malleson* (2)—decisions which the Master of the Rolls would not follow. That being so, I must look at all the authorities and endeavour to find a correct statement of the law on the subject. I consider that the principal authority in these cases is that of the case of *Milroy* v. *Lord* (3), where there is a very clear and elaborate statement of the law by the late Lord Justice *Turner*. A portion of the judgment of the Lord Justice was quoted by the Master of the Rolls in *Richards* v. *Delbridge* (4), and there is much in it which is, I think, applicable to this case. The Lord Justice, after stating that under the circumstances of the case before him it would be difficult not to feel a strong disposition to give effect to the settlement to the fullest extent, said, "but in order to render the settlement binding one or other of these modes"—*i.e.*, transfer of the property or declaration of trust—"must, as I understand the law of this Court, be resorted to, for there is no equity in this Court to perfect an imperfect gift." What I am asked to do in this case is to read that sentence as having introduced into it the words, "except as to a gift from husband to wife." The Lord Justice *Turner* also said, "The cases, I think, go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes." To give effect to this gift I must introduce the words "except in the case of a wife." The Lord Justice proceeded to say, "If it is intended to take effect by transfer the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust;" and he added that it must be plainly shewn that it was the purpose of the settlement or the intention of the settlor to constitute himself a trustee. It is clear in this case that it was not so intended. It was not the purpose or meaning of the husband in writing these letters to constitute himself a trustee for his wife. I can well understand in such a case a husband saying to his wife, "I mean to give you this as your own, but when you ask me to be a trustee for you I must respectfully decline. I do not want

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(1) 34 Beav. 623.
(2) 9 Ch. D. 113.
(3) 13 Ch. D. 822.
(4) Law Rep. 3 Eq. 686.
(5) Ibid. 10 Eq. 475.
(6) Ibid. 18 Eq. 11.

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(1) Law Rep. 3 Eq. 686.
(2) Ibid. 10 Eq. 475.
(3) 4 D. F. & J. 264, 274.
(4) Law Rep. 18 Eq. 11.

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to be involved in a trust of that kind or in any trust." Therefore it appears to me that, notwithstanding the decisions of Vice-Chancellor *Malins* and Vice-Chancellor *Bacon* in the two cases which have been observed upon—and here I may just state that the case before Vice-Chancellor *Bacon* of *Fox* v. *Hawks* (1) had many special circumstances in it which are not unlikely to have influenced his mind in arriving at the conclusion to which he came—I must hold that the furniture, plate, and other particulars, excepting the jewellery, do not belong to the Plaintiff, but form part of the late husband's estate.

Solicitors: *Clarke & Calkin.*

T. F. M.

(1) 13 Ch. D. 822.

BERGMANN *v.* MACMILLAN.

[1879 B. 691.]

FRY, J.
1881
March 7, 8.

19 Ch D 25

Principal and Agent—Account—Assignment by Principal of Part of Interest to Third Party—License to work Patent—Assignment of Part of Royalty.

When an assignment is made of a share of profits (arising, *e.g.*, from the working of a patent by licensees), the assignee is entitled to an account from the licensee, but the account must be taken once for all in the presence of all the parties interested. The licensee is not bound to account to the assignor and to each assignee of a share separately.

And the assignee who asks for an account must place himself in the position of the assignor by offering to pay to the accounting party anything which may be due to him by the assignor.

An account of profits will not be directed if it is clear that no profits have been made.

On the 2nd of May, 1878, *Alexander Macmillan*, who was desirous of taking out letters patent for the protection of a new description of button and a new description of umbrella which he had invented, agreed with *J. C. Robertson* that, in consideration of his giving him assistance, pecuniarily and otherwise, in patenting the same inventions in *England* and abroad, and in working the patents when obtained to the best advantage, *Robertson* should be entitled to receive out of the net profits derived from the patents one-fourth thereof for taking out the English and foreign patents, and a further one-fourth thereof (making one moiety in all) for procuring the necessary capital for the proper manufacture of the buttons and umbrellas.

On the 8th of May, 1878, *Macmillan*, with the assistance of *Robertson*, procured English letters patent for "improvements in umbrellas, sunshades, and other like weather protectors."

On the 6th of July, 1878, an agreement was entered into between *Macmillan* of the one part and *William Willeringham* and *H. Klinker*, trading as *Willeringham, Klinker, & Co.*, of the other part, whereby *Macmillan* agreed to appoint *Willeringham Klinker, & Co.* the sole licensees in *Great Britain* and *Ireland* for the sale of umbrellas, sunshades, weather protectors, and other things under the patent (all of which were in the agreement afterwards intended to be included under the term umbrellas), for the term of seven years from the date of the agreement. The agreement provided that *Willeringham, Klinker, & Co.* should manufacture under the directions of *Macmillan,* in sufficient quantities to meet demands promptly, either the frames of the umbrellas or the umbrellas complete, at the option of *Macmillan ;* that separate books shewing full particulars of all purchases and sales dealt with by and under their license should be kept by *Willeringham, Klinker, & Co.*, and that they should at the end of each month render accounts of such sales, and should, within one month after such account should have been rendered, pay to *Macmillan* the amount of the profits of the said sales, less 5 per cent. on the gross amount of such sales, which should be retained by them as their commission for the said sales, and such profits should be the difference between the invoice prices for the manufacture of the umbrellas and the amounts of the invoices on the sales of the umbrellas, less the commission and the discount allowed to the buyers; and that *Macmillan* should bear the losses from bad debts only on sales made to houses approved by him in writing. The agreement was to continue in force notwithstanding the death of *Macmillan,* and his legal personal representative was to be entitled to the profits in the same manner as though *Macmillan* were alive.

By an indenture dated the 18th of October, 1878, and made between *Macmillan* of the one part and *Robertson* of the other part, in consideration of *Robertson* having performed the conditions of the agreement of the 2nd of May, 1878, and of his having paid £50 to *Macmillan,* and of his having agreed to pay £56 10*s.* for the necessary patent fees for completing and taking up the English, French, Belgian, Austrian, and Hungarian patents, *Macmillan* assigned to *Robertson,* his executors, administrators, and assigns, one moiety of the patents and of the interest of *Macmillan* resulting therefrom, and one moiety of all or any of the licenses, powers, and privileges resulting therefrom, and one moiety of all or any of the benefits to the said invention, letters patent, and premises, or any of them, appertaining, to hold such moiety unto *Robertson,* his executors, administrators, and assigns, for his and their own benefit.

On the same day *Robertson* assigned his interest under the agreement of the 2nd of May, 1878, and the deed of the 18th of October, 1878, to the Plaintiff, by way of mortgage, to secure the repayment of advances made to him by the Plaintiff. Notice of the agreement of the 2nd of May, 1878, and of the two deeds of the 18th of October, 1878, was given to *Willeringham, Klinker, & Co.*

The action was commenced on the 31st of December, 1879, against *Macmillan* and *Willeringham & Klinker*, claiming that an account might be taken of all sums of money received by *Macmillan* in respect of the profits arising out of or derived from the letters patent, under the agreement of the 6th of July, 1878, and that *Macmillan* might be ordered to pay to the Plaintiff a moiety of the sums so received; that an account might be taken of all sums of money due from *Willeringham & Klinker* in respect of profits under the agreement of the 6th of July, 1878, and that the moneys which should be found due from them might be divided and paid to the Plaintiff and *Macmillan* in equal shares; that in the meantime *Willeringham & Klinker* might be restrained by injunction from paying to *Macmillan* any moneys in their hands arising from or which should thereafter arise from sales under the agreement of the 6th of July, 1878; and the appointment of a receiver of the profits.

Macmillan did not deliver any statement of defence.

At the trial it appeared that no profits had been made by the sales under the agreement of the 6th of July, 1878, and that *Willeringham & Klinker* had duly accounted to *Macmillan.*

By their statement of defence *Willeringham & Klinker* alleged that on the balance of purchases and sales made by them a considerable sum was due to them from *Macmillan* under that agreement.

The Plaintiff did not by his statement of claim offer to pay what might be due from *Macmillan* to *Willeringham & Klinker.*

It appeared that *Macmillan* had made other assignments of shares of the profits, but those assignees were not made parties to the action.

Millar, Q.C., and *Warrington,* for the Plaintiff.

The Defendant *Macmillan* did not appear.

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Seward Brice for the Defendants *Willeringham & Klinker*:—

We are bound to account to *Macmillan*, who is our principal, but we are not bound to account to the Plaintiff, who is a stranger to us: *Shaw* v. *Foster* (1); *Lockwood* v. *Abdy* (2); *Moxon* v. *Bright* (3); *Maw* v. *Pearson* (4); *Attorney-General* v. *Earl of Chesterfield* (5).

[FRY, J., referred to *Mathers* v. *Green* (6).

Millar, Q.C., referred to *Sheehan* v. *Great Eastern Railway Company* (7).]

The Plaintiff ought at any rate to have offered to pay us whatever may be due to us from *Macmillan*: *Jervis* v. *Berridge* (8).

The general words in the assignment of the patent do not carry the benefit of the license.

We cannot be compelled to account twice over. Indeed, if we are bound to account to the Plaintiff, we might equally have to account to all the persons to whom *Macmillan* has assigned shares of the profits. This would be a great hardship. The account ought to be taken once for all in the presence of all the persons interested, and on the same footing as if it had been taken between the Plaintiff and *Macmillan*: *United States of America* v. *McRae* (9); *Lindley* on Partnership (10). A contract to account is a different thing from a contract to pay money; the latter, no doubt, is assignable, and after notice the payment must be paid to the assignee; but the right to an account cannot be assigned in this way.

[FRY, J.:—If a principal has assigned things coming to him from his agent, what is the result?]

The principal must account to the assignee.

[FRY, J.:—The agent may not be liable to account twice over, but why should he not give to the assignee the account which he would be liable to give to the principal?]

In the present case the accounts are all settled as between us and *Macmillan*, and the Plaintiff is not entitled to open those accounts: *Ex parte Wilson* (1).

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(1) Law Rep. 5 H. L. 321.
(2) 14 Sim. 437.
(3) Law Rep. 4 Ch. 292.
(4) 28 Beav. 196.
(5) 18 Beav. 596. 18 Jur 656
(6) Law Rep. 1 Ch. 29.
(7) 16 Ch. D. 59.
(8) Law Rep. 8 Ch. 351.
(9) Ibid. 8 Eq. 69.
(10) 3rd Ed. p. 878. [illegible]

Millar, in reply:—

After notice of the assignment the Defendants were not entitled to account in respect of the moiety to any one but the Plaintiff.

[FRY, J.:—Has the person who is entitled to an account of profits a right to increase the burden on the accounting party by dividing the profits into 100 parts, so that he must account to the owner of each of the 100 parts? It may be that the account must be taken in the presence of all the persons interested.]

It is inherent in the very idea of property that he who is entitled to receive money is not to be at the mercy of him who is to pay it; there must be a right to an account.

FRY, J., said that as against *Macmillan* the facts stated in the statement of claim must be taken as proved, and in his judgment the Plaintiff had made out his case. There must, therefore, be a declaration that the Plaintiff was entitled to one moiety of the profits arising from the agreement between *Macmillan* and the other two Defendants. And, as against those two Defendants, his Lordship was of opinion that the assignment by *Macmillan* to the Plaintiff was an assignment of half the benefit resulting by way of royalty to him from the other Defendants. It was admitted that there had been no profits hitherto, and it appeared by the evidence that it was highly improbable that any profits would result from the license of the 6th of July, 1878. He could not direct an account of profits which were non-existent. And, as to future profits, he thought there was no reason for supposing that, if there should be any, they would not be paid by the Defendant, and he could not grant a mere *quia timet* injunction or receiver.

His Lordship added:—I think the Plaintiff was ill-founded in joining *Willeringham & Klinker* in the action, and I shall dismiss it with costs as against them. I wish to make this observation. I do not for one moment say that a person who has obtained an assignment of a share of profits is not entitled to an account of the profits from the person by whom they are payable. But, in my judgment, in order to avoid multiplicity of actions, the account must be taken once for all in the presence of all the persons interested. It is admitted in the present case that the Defendant *Macmillan* has made other assignments of shares of the profits, and the Plaintiff has not thought fit to bring the other assignees before the Court. If he is entitled to an account in the presence of one assignee alone, the account might have to be repeated at the instance of each of the other assignees, and that is a course which I should certainly not adopt. There is another observation which I desire to make. The Plaintiff has not by his statement of claim submitted to pay to the Defendants *Willeringham & Klinker* any moneys which may be due to them from the Defendant *Macmillan.* In my judgment the account cannot be taken at the instance of an assignee unless he puts himself in the position of the assignor.

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(1) 2 V. & B. 252.

Millar:—The Plaintiff ought to have the costs which he is to pay to the Defendants *Willeringham & Klinker* paid to him by the Defendant *Macmillan.*

FRY, J.:—I think you were wrong in bringing the action against them, and I cannot order *Macmillan* to pay you their costs.

Solicitor for Plaintiff: *T. W. Goldring.*

Solicitors for Defendants *Willeringham & Klinker: Goldberg & Langdon.*

W. L. C.

FOX v. BEARBLOCK.

[1874 F. 112.]

FRY, J.
1881
April 8.

Evidence—Admissibility—Entry in College Books.

It was the practice that the proceedings of the Provost and Fellows of *King's College, Cambridge*, should be entered in a book, and that the entries should be signed by the Registrar of the College, who was a notary public, and who signed the entries in that character. One or two of the entries were not so signed:—

Held, that an unsigned entry was not admissible in evidence, notwithstanding that it was proved to be in the handwriting of the person who usually made the entries at the time when it was made.

ELIZABETH BEARBLOCK, spinster, by her will, dated the 15th of April, 1872, appointed the Rev. *Edward Fox* and her sister, *Mary Ann Tyrrell Bearblock*, executor and executrix of her will, and bequeathed the residue of her personal estate to her sister. The testatrix died on the 31st of January, 1874. Her sister, *M. A. T. Bearblock*, had predeceased her. This suit was instituted by *Fox* to carry into execution the trusts of the will, and to administer the personal estate of the testatrix, who had thus died intestate as to the residue of her personal estate. The only Defendant to the suit was *Mildred Lilian Bearblock*, an infant. She was a niece of the testatrix, being the daughter of a brother. The bill alleged that the Defendant was the sole next of kin of the testatrix.

In order to make out the title of the Defendant as next of kin it became necessary to prove the marriage of her grandfather, the Rev. *James Bearblock*, the father of the testatrix and of the Defendant's father. No certificate of his marriage could be discovered. He was born in the year 1766, and from the year 1796 down to the year 1804, and for many years afterwards, he was living in the parish of *Hornchurch*, in *Essex*, and was curate of the neighbouring parish of *Upminster*. There was evidence to shew that he lived there with a lady who passed as his wife, and that he was reputed to be a married man. The evidence tended to shew that he was married about the year 1795 or 1796. Certificates of the baptisms of his children were produced, extracted from the registers of the parish of *Hornchurch*, in which the children were respectively described as children of *James* and *Mary Bearblock*. The eldest child was baptized on the 20th of October, 1796.

The Rev. *James Bearblock* had been formerly a fellow of *King's College, Cambridge*. He was admitted to his fellowship in the year 1787. It appeared by the books of the College that he had continued to receive the stipend attached to his fellowship down to the year 1803. In that year some rumour reached the college authorities that he was either married or living in concubinage, and in consequence of this an inquiry was held by the Provost and Fellows of the College, and the Bishop of *Lincoln*, who was the Visitor of the College. Mr. *Bearblock* was charged with being either married or living in open fornication. According to the statutes of the College, a fellowship was *ipso facto* vacated by marriage, and it was liable to forfeiture on proof that the holder was living as a notorious fornicator. Minutes of the proceedings on this inquiry, which resulted in the expulsion of Mr. *Bearblock* from his fellowship by the decision of the Visitor, in March, 1804, were entered in a book belonging to the College, called *Liber Protocollorum*. In this book were entered the admissions of the scholars and fellows, and other proceedings before the College authorities. All the entries in the book, with one or two exceptions, were attested by the Registrar of the College, who was a notary public, and who attested them in that character. The entry of the proceedings in relation to Mr. *Bearblock* was not attested. It was proved that the entry was in the handwriting of the person by whom the entries were usually made at that time, he being the nephew of the then Registrar of the College, who was blind.

The Attorney-General, on behalf of the Crown, claimed the residue of the estate of the testatrix, alleging that she had no next of kin, on the ground that her father, the Rev. *James Bearblock*, was not married, and that consequently the testatrix and her brother, the father of the infant Defendant, were illegitimate. As evidence of this, the entry in the *Liber Protocollorum* of the proceedings on the inquiry in relation to Mr. *Bearblock* was tendered. The Chief Clerk held that it was admissible, and he found by his certificate that the testatrix had no next of kin living at the time of her death. A summons to vary the certificate was taken out on behalf of the Defendant.

J. Pearson, Q.C., and *W. W. Karslake*, for the Plaintiff.

J. Brown, Q.C., *Higgins*, Q.C., and *Rawlinson*, for the Defendant:—

The entry in question is not admissible in evidence, not being authenticated according to the ordinary practice. The importance of the signature of a notary is shewn by *Rex* v. *Verelst* (1); *Burn's* Ecclesiastical Law (2). In *Cornwall Mining Company* v. *Bennett* (3) it was held that minutes of resolutions of directors of a company not signed by the chairman were not evidence of the making of a call on the shareholders. *Southampton Dock Company* v. *Richards* (4) does not conflict with this. These proceedings are of a *quasi*-judicial character, and ought to be properly authenticated.

Sir *H. James*, A.G., Sir *F. Herschell*, S.G., and *J. Rigby*, for the Crown:—

It was no doubt the usual practice for the entries in this book to be signed by the Registrar. But, when the entry is found in the College book, and is proved to be in the handwriting of the person who at that time made the entries for the Registrar, there being no law or statute of the College which required that the entries should be signed by the Registrar, there is no reason why the entry should not be admitted as evidence. There are some other unsigned entries, so that the practice was not uniform.

Fry, J.:—

It appears to me that this entry is not admissible. It is not suggested that an entry made in a book by any person not acting in any official character, an entirely irresponsible person, can be given in evidence of reputation, still less of the facts stated in

(1) 3 Camp. 432.

(2) 9th Ed. vol. iii. pp. 11, 12.

(3) 5 H. & N. 423.

(4) 1 Scott, N. R. 209.

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that entry. In the present case it appears that the course of the College was for the minutes to be entered in this book by the nephew of the then Registrar, who was a notary public, and to be signed by the Registrar as a notary public. But for some reason which we cannot now learn, the whole of this body of proceedings with regard to Mr. *Bearblock* was not signed by the Registrar, and they are not in any way authenticated by him. That certainly leads to the inference that they were in some manner less regular, or less authentic, or intended to be less binding on the College than the ordinary proceedings which are the subject of the entries in the book. The absence of his signature appears to me to be very significant of some want of confirmation of the proceedings, or some defect by reason of which they ought not to bind the College, and which rendered it improper for him to attest the entry in the ordinary way, and therefore it cannot be treated as part of the minutes of the College. It is a mere entry found in the book, made by the nephew of the Registrar, and, so far as I can tell, without authority, and as such it is not admissible. I therefore feel constrained to reject it. I ought to add that I cannot help attaching considerable weight to the fact that the practice was to employ a notary, and a notary was a person of great significance in the canon law, as is pointed out in *Burn's* Ecclesiastical Law.

In the result,

FRY, J., held that the evidence of reputation of marriage was not rebutted, and that the Defendant was proved to be the sole next of kin of the testatrix.

The Chief Clerk's certificate was varied accordingly.

Solicitors for Plaintiffs and Defendant: *Crosse, Sons, & Riley*, agents for *Haynes & Clifton, Romford.*

Solicitors for the Crown: *Hare & Fell.*

W. L. C.

SNOW *v.* BOLTON.

FRY, J.
1881
April 26.

[1879 S. 562.]

Practice—Non-payment of Costs—Rules of Court of April, 1880 [*Order* XLVII., *r.* 2]—*Subpœna for Costs—Sequestration—Chambers.*

On a motion the Court gave leave in its discretion, under the Rules of Court of April, 1880, to issue a sequestration for the payment of costs.

Where such application is made in an action which is transferred for hearing only to a Judge who does not sit in Chambers, it is properly made to such Judge in Court; otherwise in Chambers.

THIS was a motion by the Defendant for leave to issue sequestration against the Plaintiff under Rules of Court of April, 1880 (Order XLVII., rule 2), which provides that "no subpœna for the payment of costs, and, unless by leave of the Court or a Judge, no sequestration to enforce such payment, shall be issued."

The Defendant had obtained an order that the Plaintiff, who was an officer living on a pension, should pay certain costs.

The action was one which had been transferred to Mr. Justice *Fry* for hearing only. When notice of motion was given Mr. Justice *Fry* did not sit in Chambers.

Rawlins, for the motion, applied for the usual four-day order for the payment of the costs, and for leave to issue sequestration: *Seton* (1).

Oswald, for the Plaintiff:—

Sequestration is not the proper remedy: *Ex parte Nelson* (2). The application should have been made in Chambers.

FRY, J.:—

That sequestration is a proper mode of enforcing payment of costs is shewn by the words of the Order cited to me, Order XLVII., rule 2, by which it is now left to the discretion of the Court to determine whether sequestration shall issue in such a case. The practice of obtaining a subpœna for costs has been taken away

(1) 4th Ed. vol. ii. p. 1575.

(2) 14 Ch. D. 41.

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by that rule, and no remedy has been substituted excepting that which I am now asked to authorize. It appears that a writ of *fieri facias* would be useless in this case, and an application under the *Debtors Act* to send the Plaintiff to prison would have been a harsher course than that which I am asked to take, and the power of imprisonment is also limited by the 5th section of the *Debtors Act*. Therefore I shall grant the motion, and allow the writ of execution to be issued.

As regards the contention that the application should have been made in Chambers, this will be so in future, as I shall henceforth sit in Chambers, but hitherto, where actions have been transferred to me for hearing only, the practice has been to make applications of this nature to me in Court, and this application has therefore been rightly made.

Solicitors: *Bolton, Robbins, & Busk*; *Vanderpump*.

C. W. C.

FRY, J.
1881
April 6.

HOOLE *v.* SMITH.

[1880 H. 129.]

Mortgage—Power of Sale—Notice to Mortgagor or his Assigns.

A mortgage contained a power of sale with a proviso that the mortgagee was not to execute the power without giving notice to the mortgagor or his assigns. The mortgagor assigned his equity of redemption by way of mortgage to a second mortgagee:—

Held, that such second mortgagee was entitled to receive notice of the first mortgagee's intention to exercise his power of sale, and was entitled to damages from him for default in giving such notice.

SAMUEL HARRISON mortgaged property in *Rotherham*, in the county of *York*, to the Defendant, *William Smith*, for £450, on the 26th of April, 1872, and, subject to such mortgage, he mortgaged the same property to *Thomas Pierson* for £140 on the 9th of May, 1873. Notice of the second mortgage was immediately given by *Thomas Pierson* to *William Smith*. And on the 9th of April, 1874, *Thomas Pierson*, with the concurrence of *Samuel Harrison*, transferred the second mortgage to the Plaintiff *Hoole*, who gave notice of such transfer to *William Smith*.

The first mortgage to *William Smith* contained the usual power of sale, qualified by the proviso that "the said *W. Smith*, his executors, administrators, or assigns, should not execute the said power unless and until he or they should have given a notice in writing to the said *S. Harrison*, his executors, administrators, or assigns, to pay off the moneys for the time being due and owing on the said indenture," and default should have been made in payment.

William Smith sold the mortgaged property on the 30th of April, 1877, without giving notice to *Hoole*, who brought this action charging that such sale was made improvidently and at an undervalue, and seeking to recover from *Smith* any deficiency of price caused by such improper sale. He also asked for an account against *Smith* as a mortgagee in possession, and for damages alleged to be due to *Hoole* on account of the neglect of *Smith* to give him notice of the sale, through which neglect he had been deprived of the property which was a security for his mortgage debt.

Cookson, Q.C., and *Chester*, for the Plaintiff, referred to *Gill* v. *Newton* (1).

North, Q.C., and *Hatfield Green*, for the Defendant, referred to *Forster* v. *Hoggart* (2).

Fry, J., after dealing with other matters not material to this report, said:—

The question arises, was the Plaintiff *Hoole*, as assign of *Pierson's* second mortgage, entitled to receive notice of the Defendant's intention to sell the property under the proviso which qualified the power of sale contained in the first mortgage?

It is plain that *Pierson* and *Hoole* were assigns from *Harrison*, of whose assignments the Defendant *Smith* had notice. The question in issue is whether he acted lawfully in selling without giving notice to *Pierson* or *Hoole*. In my opinion notice to *Harrison* alone was not enough. Notice ought to have been

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(1) 14 W. R. 490. 12 Jur NS. 220

(2) 15 Q. B. 155.

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erved either upon *Harrison*, the first mortgagor, and his assigns, or upon the assigns, and not upon *Harrison*. When I find the word "assigns" used in the power of sale as an alternative for *Harrison*, it is impossible that I can hold that it was sufficient for the Defendant to go on serving *Harrison* alone after he had assigned his equity of redemption. The object of the proviso was that any assign might be at liberty to intervene and pay off the mortgage, and no one could be more interested than the second mortgagee in this right of intervention; whether *Harrison's* right to require notice was excluded by his assignment to a second mortgagee is irrelevant to the present case. The Plaintiff will have an inquiry for damages against the Defendant for exercising the power of sale without notice to him.

Solicitor for Plaintiff: *C. Butcher.*
Solicitors for Defendant: *Church, Sons, & Clarke.*

C. W. C.

WILLIAMS *v.* WILLIAMS.

KAY, J.

1881

April 7, 9.

[1880 W. 2803.]

Trustee—Solicitor—Notice of Settlement—Sales.

A settlement of land in *Wales*, the property of the husband, was executed shortly after a marriage, which took place in *India*. The husband and wife went to reside in *Wales*, and the husband employed a solicitor there to make his will and to sell part of the land, the solicitor concluding from the statements of the husband that there had not been any marriage settlement. The husband died leaving his widow trustee and executrix, and directing his debts to be paid out of his estate. The widow employed the same solicitor to sell other part of the land, and the solicitor received the purchase-moneys and applied them in payment of the debts of the husband. The deed of settlement had been in the possession of the wife, but had been by her given to the husband. There was no evidence as to what had become of it, but after the sales had been made a copy was found. The solicitor had concluded from what he was told by the husband that there had been no settlement, and though, before all the sales were completed, his clerk had been told by the wife that there had been a settlement, the solicitor continued to believe that there had been none.

An action was brought by the children of the marriage, entitled under the settlement, claiming to recover from the solicitor the money which had so passed through his hands:—

Held, that under the circumstances, although the solicitor might have been negligent in that character, he could not be held to have had such notice of the settlement as to be treated as constructively a trustee, and therefore liable for the money which had passed through his hands.

Notice to raise a constructive trust is different from notice to an actual trustee.

Cothay v. *Sydenham* (1) discussed.

MR. *EDWARD WILLIAMS* was, under the will of *Evan Williams*, entitled to one undivided third of certain lands in the county of *Radnor*. On the 7th of August, 1863, he was married at *Ootacamund*, in *India*, to *Gertrude Louisa Williams*. Previously to their marriage Messrs. *Boyson & Miller*, solicitors at *Madras*, had been instructed to prepare a settlement, and the engrossment of a deed of settlement was accordingly sent by them from *Madras* on the 5th of August, 1863. It did not, however, arrive at *Ootacamund* till after the marriage had taken place. It appeared that

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(1) 2 Bro. C. C. 391.

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it was executed by Mr. and Mrs. *Williams* and *Edwin W. G. Williams* some days afterwards. The deed so executed was dated the 10th of August, 1863, and by it *Edward Williams* conveyed all his share under the will of *Evan Williams* to *Edwin W. G. Williams* and *Peter Shuttleworth,* upon trust for *Edward Williams* during his life, and after his death for *Gertrude Louisa Williams* during her life, and after the death of the survivor, upon trust to sell the trust estate and hold the proceeds of sale in trust for the children of the marriage as therein mentioned.

Mr. *Williams* returned to *England,* and resided at *Rhayader,* in the county of *Radnor,* where he became on intimate terms with *Arthur Cheese,* a solicitor there. In 1867 Mr. *Cheese* made a will for Mr. *Williams.* It appeared from Mr. *Cheese's* evidence that during the discussion as to the will, Mr. *Williams* mentioned a memorandum which had been made on his marriage, and that Mr. *Cheese* then inquired if there had been any marriage settlement; Mr. *Williams* said there was none, but that a memorandum had been prepared which arrived too late. And Mr. *Cheese* appeared, in the opinion of the Court, to have come to the conclusion that there had been no marriage settlement. By the will so prepared the testator appointed Mrs. *Williams* sole executrix and trustee thereof, and after directing payment of the testator's debts out of his real and personal estate, he gave, devised, and bequeathed all his real and personal estate unto his wife for life, and after her death to his children.

In 1868 a partition of the estate of *Evan Williams* was made under a decree of the Court, and about 660 acres of land in the county of *Radnor* was conveyed to Mr. *Williams.*

In 1869 Mr. *Williams* sold part of these lands, Mr. *Cheese* being his solicitor in the sales, and the purchase-money, about £8000, seemed to have been applied in payment of Mr. *Williams'* debts.

The deed of settlement of 1863 had been given to Mrs. *Williams,* and remained in her possession until the year 1875. Some time in that year Mr. *Williams* asked his wife for the deed of settlement, saying that he was going to make a will. Mrs. *Williams* gave him the deed, and it was not known what afterwards became of it.

In 1877, the will of 1867 having been damaged, a copy of the old draft was made in Mr. *Cheese's* office, and was executed by Mr. *Williams* as a new will.

On the 4th of January, 1879, Mr. *Williams* died, and Mrs. *Williams*, under the advice of Mr. *Cheese*, put up for sale other parts of the lands. The lands so put up for sale were sold accordingly, and the purchase-moneys, amounting to £3435, were received by Mr. *Cheese*. Part was applied by him in payment of the debts of Mr. *Williams*, including some money due to himself, and the rest, amounting to £1799, was paid into Court in this action.

On the 7th of January, 1880, in consequence of a question by one of the purchasers, Mr. *Wood*, a clerk in Mr. *Cheese's* office, wrote to Mrs. *Williams* asking if there had been any settlement on her marriage, and saying that he was under the impression there was not any, but was bound to ask the question. Mrs. *Williams* answered that there was a marriage settlement, which she had given to her husband, and that she was under the impression that he had given it to Mr. *Cheese*; and she inclosed a note from the *Madras* solicitors mentioning a settlement. Mr. *Wood*, in his evidence before the Court, said that he was sure he did not read the inclosed note, and that if he had read it he should have concluded that there was a settlement. He, however, on the 21st of January, 1880, went to the house of Mr. *Cheese* to speak to him on the subject. Mr. *Wood* did not shew Mr. *Cheese* the letter or note, but told him that Mrs. *Williams* had said there was a settlement. Mr. *Cheese* said that it was all nonsense, that she was referring to a promise only, and that there had been no settlement.

Some of the sales were completed and the purchase-money dealt with after this date.

A copy or draft of the settlement was afterwards found in the office of the *Madras* solicitors with the names of the executing parties upon it.

The eight children of Mr. *Williams* thereupon brought this action against Mrs. *Williams*, the trustees of the marriage settlement, and Mr. *Cheese*, claiming a declaration that the marriage settlement was duly executed, and that the trusts thereof might be carried into execution; also an account of the proceeds of sale received, or which might have been received but for their wilful neglect or default by the trustees of the settlement; and that *Arthur Cheese* might be declared liable to account for and make good the purchase-money arising from the sale of the hereditaments comprised in the indenture of settlement received and disposed of by him with notice of the trusts of the said indenture.

Mr. *Cheese* denied that he was aware of the existence of the settlement, and said that no mention of it was made by Mr. *Williams*, or by Mrs. *Williams*, or by *E. W. G. Williams*, one of the trustees who was aware of the sales.

The principal question on the hearing was as to the liability of Mr. *Cheese* for the money arising from the sales after the death of Mr. *Williams*.

Mrs. *Williams*, Mr. *Cheese*, Mr. *Wood* and other witnesses were examined in Court. The effect of their evidence is stated above and in the judgment.

J. Pearson, Q.C., and *E. Ford*, for the Plaintiffs:—

The estates were settled, but have been sold, and the proceeds have been applied towards the payment of Mr. *Williams*' debts. The money has passed through the hands of *Cheese*, and he is liable to the children. The evidence shews that he had distinct notice of the existence of a settlement.

Millar, Q.C., and *Byrne*, for Mrs. *Williams*.

Rigby, and *Cozens-Hardy*, for the trustee, *Edwin W. G. Williams*.

Higgins, Q.C., and *Dunning*, for Mr. *Cheese*, were stopped by the Court.

J. Pearson, in reply:—

The reasonable inference from the evidence is that in 1867 *Cheese* knew that there had been a settlement, and he could not have forgotten it in 1877. *Jones* v. *Smith* (1) was a case of a purchaser for valuable consideration who made inquiry and was told there was no settlement. Here *Cheese* had made up his mind that there was no settlement and would not inquire; he must take the consequences: *Cothay* v. *Sydenham* (1).

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(1) 1 Hare, 43; 1 Ph. 244.

KAY, J.:—

There are two questions raised in this case. First, was there a settlement upon the marriage of Mr. and Mrs. *Williams;* and, secondly, if there was, can Mr. *Cheese* be treated as liable on account of what he has done, for so much of the purchase-money of the property included in the settlement as passed through his hands?

Now, as to the first question, there does not seem to be much contest. [His Lordship then stated the evidence on the subject; upon which he held that the execution of the settlement and its terms were sufficiently proved; and he made a declaration accordingly.]

Then comes the question upon which the real difficulty in this case has arisen. It is whether Mr. *Cheese* had such notice of this settlement as to make him personally liable in respect of the proceeds of the sales after the death of the husband which passed through his hands as solicitor of the widow. Mr. *Pearson* has said very fairly that he does not impute any wrong motive to Mr. *Cheese,* and I must say that upon the evidence I do not see any trace of any wrong motive in anything which Mr. *Cheese* did.

But the question is one upon which I must declare my opinion, partly as a juryman and partly as a question of law. I consider it a question of difficulty, upon which another mind might possibly arrive at a different conclusion. Now the facts are these:—[His Lordship then stated the facts and the evidence as to the preparation of the will in 1867, coming to the conclusion that Mr. *Williams* was under the impression that there had been no settlement, only a memorandum which was too late; and that Mr. *Cheese* was at that time thoroughly satisfied that there had been no marriage settlement, nothing binding, a mere memorandum, for he certainly would not have carried into effect the sales of 1869 if he had been aware of the settlement. As to the handing over the settlement in 1875, his Lordship felt bound to conclude that Mr. *Williams* either destroyed or kept the deed of settlement, and his Lordship fully believed Mr. *Cheese's* statement that he never saw it. As to what occurred in January, 1880, it was admitted that notice to Mr. *Wood* would not be notice to Mr. *Cheese*, and the question was how far this notice was brought home to Mr. *Cheese*. His Lordship then stated the evidence as to these transactions.]

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(1) 2 Bro. C. C. 391.

That, then, is the most important part of the evidence against Mr. *Cheese*. I take the result of it fairly to be this: Mr. *Wood* had distinct notice from Mrs. *Williams* that she alleged there was a settlement; and more, because by the letter inclosed he would have had reason to believe that there had been some settlement executed. But Mr. *Wood* never shewed either of these letters to Mr. *Cheese;* he told him practically the effect of Mrs. *Williams*' letter, which was her assertion that there was a settlement. Mr. *Cheese's* answer was, "It was all nonsense, she was referring to a promise that had been made." I have to consider this, which is a point upon which there may be difference of opinion, namely, whether that notice to Mr. *Cheese* was a notice which fixed him with a liability in dealing with the property afterwards—dealing, I mean, as solicitor for Mrs. *Williams*—or whether that notice may be treated as counteracted by the statement which Mr. *Williams* had made a long time before, upon the belief of which both Mr. *Williams* and everybody concerned had acted, namely, that there was no settlement at all, but only a memorandum which Mr. *Cheese* understood was never executed.

These questions of notice and of the effect of notice are some of the most difficult questions which a Court of Equity has to deal with; and I cannot help feeling that one must be very careful not to strain the doctrine of notice too far, and to make it involve consequences of liability to persons who may be practically innocent. It is decided and settled by the case of *Jones* v. *Smith* (1), that where one has notice of a deed, but is told by the person who gives him notice of it that the deed does not affect the particular property which he is going to deal with, he is not bound to inquire further, but may under certain circumstances deal with that property upon the faith of that statement. Then Mr. *Pearson* referred me to the case of *Cothay*

(1) 1 Hare, 43; 1 Ph. 244.

v. *Sydenham* (1), where the question was one of this kind. The trustee of a settlement, being a solicitor, prepared a draft appointment under that settlement. He had, therefore, knowledge of the draft appointment having been prepared, and the question was whether that gave him notice that it was executed, as it most probably would be. In short, whether that notice was sufficient to put him upon inquiry whether the appointment had been executed. Now observe that there was nothing in that case, as in *Jones* v. *Smith,* to produce any impression on the mind of the trustee that it had not been executed, and that seems to me to be the distinction between the two cases. If a man has notice that there is a deed or document, and at the same time has notice that that deed or document is either entirely worthless or does not affect the property with which he is going to deal, he is put so completely off his guard that a Court of Equity does not treat him as fixed with knowledge of the document or the effect of it. But in *Cothay* v. *Sydenham* there was nothing of that kind, and yet Lord *Thurlow* does not do more than express a doubt whether the trustee in that case was affected by the notice. When that case is commented on by the Lord Chancellor in *Jones* v. *Smith,* he says (2): "A party had notice of the draft of a settlement having been actually prepared; in fact he had himself prepared it. The question was whether he was to be considered as having constructive notice of the deed itself. Now a prudent, cautious, and wary person, knowing that a draft had been prepared, would take care to inquire before he advanced his money whether a deed had been executed in conformity with that draft; yet Lord *Thurlow* held that a party having notice as a purchaser—the case was that of a trustee, but he put the case of an ordinary purchaser —that the draft of a deed had been prepared, was not to be considered as having constructive notice of the deed itself, unless he knew that the deed had been executed. Suppose that in this case the party had been told that there was no settlement, it is quite clear he would not have been affected with notice: still notwithstanding the statement that there was no settlement on the marriage, a person about to advance his money, if he were a very prudent, cautious, and wary person, would inquire of the connections of the parties whether or not a settlement had been executed before he advanced any considerable sum of money." So that I take it to be clear that in *Cothay* v. *Sydenham* (1) a mere purchaser would not have been affected by the notice given, though there was no counter-notice—no intimation given at the same time that the document did not affect the property, or that the document was not executed, or anything of that kind. It being a case of mere notice, the purchaser would not have been affected; and the doubt in Lord *Thurlow's* mind was whether the actual trustee, and not a constructive trustee, was affected by that notice, there being nothing to lead him to suppose that the appointment was not executed.

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(1) 2 Bro. C. C. 391.

(2) 1 Ph. 256.

But it seems to me that there is what must be considered a wide distinction between that case and the case I have to decide, because here Mr. *Cheese* was not in the position of a trustee. This is not the case of a trustee of a settlement having notice of a deed or document, or of the preparation of a deed or document which he must suppose probably to have been executed. But this is a question, not of notice to a person in the position of trustee; but whether Mr. *Cheese*, having such notice in his character of solicitor of the wife, can be treated as being constructively a trustee of the settlement, which I take it is a very different thing in a Court of Equity.

Mr. *Pearson* argued with very great force, that when Mr. *Cheese* got this additional notice coming from the wife, the intimation he had had from the husband, that there was no settlement but a mere memorandum which he understood was not executed, ought to have been entirely disregarded, and that he ought to be treated as if he had received an entirely fresh and independent notice, a notice not affected in any way by that counter-statement. But I cannot look at that alone. It was not only that counter-statement which produced the impression on Mr. *Cheese's* mind. There was besides the counter-statement, the long course of dealing with the property, a large part of which had been sold, all such sales proceeding upon the basis that there was no settlement. There were the twelve years during which he had been in constant communication with both husband and wife, no mention of any settlement having been made to him after that first statement of the husband that there was none. Mr. *Cheese*, therefore, had a right, I think, under these circumstances, to be very strongly of opinion that there was no settlement at all.

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(1) 2 Bro. C. C. 391.

I am not now dealing with the question whether Mr. *Cheese* was negligent in his duty as solicitor. That I take to be a perfectly separate and distinct question. Whether he did his duty as solicitor to Mrs. *Williams*, or was negligent in that duty, is, I think, a very different question from the question whether he had such notice as to make his concurring as her solicitor in the sales of the property and allowing the money to pass through his hands sufficient to affect him personally so as to make him liable to repay the money. The case, again, would have been different if I had been satisfied that Mr. *Cheese* had wilfully shut his eyes—if there had been any motive whatever fairly suggested for supposing that Mr. *Cheese* was desirous of thinking that there was no settlement. If it were proved to me upon the evidence that he had wilfully shut his eyes, and was determined not to inquire, then the case would have been very different. But Mr. *Pearson* has said, with his usual fairness and accuracy, that there is no evidence of that kind in this case, though he accuses Mr. *Cheese* of great negligence. Upon that I do not say at present whether he was negligent or not.

But if I suppose that Mr. *Cheese* was very negligent in his duty as solicitor to the wife, will that be sufficient to countervail the effect of the statement made to him by the husband, and the conduct through the many years during which he had known them both, which conduct was entirely inconsistent with the notion that there could be any settlement of the property? That is a question of difficulty; but having considered it with all the care I am able to bestow, I cannot say that under these circumstances the conduct of Mr. *Cheese* was such as to affect him with this personal liability. I do not find that anything done by Mr. *Cheese* in the matter was done for his own benefit. There were certain sums paid to him out of this purchase-money which were properly due to him either from the husband or from the wife. If he had, as I believe he had, a *bonâ fide* conviction that there was no settlement whatever, and that the wife in what she said to Mr. *Wood* and what Mr. *Wood* repeated to him was merely referring to that incomplete memorandum of which he had previously heard from the husband, and which he treated as a dead letter—if that was the impression on his mind—I think it was reasonable under the circumstances that that impression should continue, and that he should give to Mr. *Wood* the answer he gave, and I cannot hold that he is affected with such notice as to make him personally liable for the purchase-moneys which passed through his hands as solicitor.

I wish that I could leave the case there; but it is impossible for me to do that. I cannot acquit Mr. *Cheese* of very great negligence towards his client. If he had been a little more vigilant and prudent, if he had shewn more capacity as a solicitor, and had been more careful in the performance of his duty as a solicitor, I do not say that he would have discovered this settlement—I do not know that he would—but I think it very probable that he might; and if he had, upon this second intimation, a great deal of the loss of this property to the infants who are interested under the settlement might have been prevented. Therefore, though I feel bound to dismiss the action against Mr. *Cheese,* I shall dismiss it without costs.

Solicitors for Plaintiffs: *Underwood, Son, & Piper.*
Solicitors for Mr. *Cheese: Merediths & Co.*
Solicitors for Trustee: *Waterhouse & Winterbotham.*

C. M.

Ex parte BACON. *In re* BOND.

C. A.
1880
C. J. B.
Dec. 20.
C. A.
1881
March 24.

S affd as
bot
25 ChD 147

Bankruptcy—Acceptance of Composition under Sect. 28 *of Bankruptcy Act*, 1869 *—Locus Standi of Bankrupt to apply to reduce Proof of a Creditor—File of Proceedings in Bankruptcy—Estoppel.*

After the creditors of a bankrupt have resolved, under sect. 28 of the *Bankruptcy Act*, 1869, to accept a composition offered by the bankrupt, the bankrupt, though undischarged, has a *locus standi* to apply to the Court to reduce the amount of the proof of a creditor, and the mere fact that the proof has been upon the file of the proceedings in the bankruptcy for upwards of a year does not estop the bankrupt from making the application.

Decision of *Bacon*, C.J., affirmed.

The file of the proceedings in a bankruptcy is not in the nature of a record, and does not create an estoppel.

ON the 18th of February, 1878, the Rev. *Alfred Bond* filed a liquidation petition in the *Ipswich* County Court, under which his creditors resolved to accept a composition of 20*s*. in the pound, payable in instalments. Default was made in payment of the first instalment, and on the 6th of January, 1879, the debtor was adjudicated a bankrupt under the power given to the Court by sect. 126 of the *Bankruptcy Act*, 1869.

At a meeting of the creditors under the bankruptcy on the 27th of January, 1879, two trustees were appointed. At the same meeting Messrs. *Bacon, Cobbold, & Co.*, bankers at *Ipswich*, tendered a proof for a debt of £3132 4*s*. 7*d*. No objection was then taken to the proof, and no indorsement of any objection was made on it by the chairman of the meeting. On the 5th of April, 1879, one of the trustees wrote in the margin of the proof that he, on behalf of himself and his co-trustee, reserved the proof for further consideration. The proof, however, was never formally admitted by the trustees, but they gave no notice to *Bacon, Cobbold, & Co.* of its rejection, and it remained on the file of proceedings.

On the 4th of August, 1880, a meeting of the creditors (which had been convened by the trustees under sect. 28 of the *Bankruptcy Act*, 1869) was held, and a resolution was passed by the proper majority accepting an offer which had been made by the bankrupt to procure to be paid to the trustees such a further sum of money as, together with the sum of £1165 which was in their hands, would enable them to pay the creditors a composition of 7*s.* in the pound on their respective debts, and that on this being done the adjudication should be annulled. *Bacon, Cobbold, & Co.* signed the resolutions as creditors for the amount mentioned in their proof. Application was then made to the Court to confirm the resolutions. The application was opposed by one of the creditors, but he ultimately consented to the confirmation on a guarantee being given that the composition on his debt should be paid within three months, and that the order confirming the resolutions should not be drawn up until the payment had been made. On the 23rd of October, 1880, the order of confirmation not having been drawn up, the bankrupt applied to the County Court for an order that the proof of *Bacon, Cobbold, & Co.* should be reduced from the sum of £3132 4*s.* 7*d.* to the sum of £1900, or to such sum as might, on proper inquiry, be found to have been due from the bankrupt to them at the date of the adjudication. Upon the hearing of the application the preliminary objection was taken on behalf of *Bacon, Cobbold, & Co.* that the bankrupt had no *locus standi* to make it, and that any question of proof was a question for the trustees, and not for the bankrupt. The Judge allowed this objection, and, simply on the ground that the bankrupt had no *locus standi,* dismissed the application without entering into the merits.

The bankrupt appealed to the Chief Judge. The appeal was heard on the 20th of December, 1880.

De Gex, Q.C., and *H. Tindal Atkinson,* for the Appellant:—

The Court can always reduce a proof: *Bankruptcy Act,* 1869 (32 & 33 Vict. c. 71), ss. 66, 72. The bankrupt being the only person who has an interest in reducing the proof has a *locus standi: Ex parte Broadley* (1); *Ex parte Pitchforth* (2); *Ex parte Ranby* (3).

E. Cooper Willis, and *Poyser,* for *Bacon & Co.*:—

The application is too late, the proof having been on the file for sixteen months. An undischarged bankrupt has no *locus standi:*

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(1) 2 M. D. & D. 524.

(2) Mont. & Ch. 96.

(3) 14 Ch. D. 467.

Ex parte Kemp (1); *Ex parte Sheffield* (2); *Ex parte Worthington* (3); *In re Sidebotham* (4); *Ex parte Bond* (before C. J. B. June 7, and C. A. Dec. 9, 1880); *Ex parte Holmes* (5).

BACON, C.J.:—

I am of opinion that the bankrupt has a *locus standi*. He has undertaken to pay a certain composition in the pound on the respective debts of his creditors. He cannot escape from that. The Act casts upon the Court the duty of enforcing the resolutions. His *locus standi* is expressed in those very resolutions. He is to pay the composition, and then he will be entitled to have the bankruptcy annulled. He wishes, in order to perform his part, to have the amount of this debt ascertained. It cannot be said that this particular debt was ever admitted. The file itself contradicts that. Suppose he does owe all the money on the proof, which has not been admitted. He is under an obligation, which it is the duty of the Court to enforce against him, of paying the composition on that money. But he disputes it, and the extent of the obligation can only be ascertained by application to the Court. The rights of the parties are not affected by the delay of sixteen months. The bankrupt has a right to have the matter inquired into. The appeal must be allowed.

The order of the County Court was discharged, and the case was referred back to that Court to inquire what was due from the bankrupt to *Bacon & Co.* at the time of the adjudication.

C. A.

Bacon & Co. appealed. The appeal was heard on the 24th of March, 1881.

E. Cooper Willis, and *Poyson*, for the Appellants:—

The composition of 7*s*. in the pound was accepted on the basis of the amounts of the proofs as they then appeared, including the proof of the Appellants, and the bankrupt is not entitled afterwards to come to the Court and get a proof reduced for his own

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(1) 21 W. R. 450.
(2) 10 Ch. D. 434.
(3) 3 Ch. D. 803.
(4) 14 Ch. D. 458.
(5) 29 W. R. 124. 44 LT/1880/178

C. A.
1881

Ex parte Bacon.
In re Bond.

benefit: *Ex parte Peacock* (1); *Ex parte Worthington* (2). An objection to a proof must be made within a reasonable time: *Ex parte Good* (3); *Ex parte Kemp* (4). The proof is on the file of proceedings, and the bankrupt is not entitled to go behind that. When there is an arrangement under sect. 28 the bankruptcy is not suspended. The bankrupt is not yet discharged; he has no property and no interest in the surplus, beyond a mere hope or expectation, and is not entitled to interfere in the administration: *Ex parte Sheffield* (5). Under sect. 20 of the *Bankruptcy Act*, 1869, he has a right to apply to the Court to reverse any act of the trustee by which he is aggrieved.

Winslow, Q.C., and *H. Tindal Atkinson*, for the bankrupt, were not heard.

James, L.J.:—

The only question really now before the Court for decision is whether the bankrupt had a *locus standi* to do that which it is said the trustee alone had a right to do, viz., to apply to reduce 25 Ch. D. 447 the amount of this proof. In an ordinary case, no doubt, questions as to the amount of the proof of a creditor ought to be left to be dealt with by the trustee. The learned Chief Judge, however, pointed out that which appears to me to be a broad distinction between this case and the ordinary case of a proof in bankruptcy, viz., that the matter had resulted in an arrangement by which the bankrupt undertook to pay a sum of 7*s*. in the pound upon the debts due to the creditors. Then he says, I want to reduce the amount of this proof, because I want to reduce the number of 7*s*. which I shall have to pay. He has a personal interest in that, for if he does not perform that engagement according to the true intent and meaning of it, the Court of Bankruptcy will enforce it against him. He may say, therefore, I have a great interest in this matter altogether distinct from that of the trustee, who in an ordinary case is only interested in knowing how much of the estate shall go to a particular creditor.

(1) Law Rep. 8 Ch. 682.
(2) 3 Ch. D. 803.
(3) 5 Ch. D. 46.
(4) 21 W. R. 450.
(5) 10 Ch. D. 434.

The trustee represents the estate, and that is a question with every individual creditor; but here, when the bankrupt has undertaken, under resolutions confirmed by the Court, to pay a certain sum of money upon the amounts of the debts, it would be a violation of all justice to say he has not a right to apply to reduce the amount of a debt in which he has an interest, and in which the trustee and the other creditors have none. It seemed at first sight that there might be a grave question whether what had been done did not amount to an estoppel, whether the debtor, having agreed to pay 7*s.* in the pound to (amongst other creditors) this particular creditor, can afterwards be heard to say that the debt was smaller than it was stated to be when the resolution was passed. The creditor would say, I accepted the composition from you on that footing, and you have no right to diminish the debt on which I was to accept the composition. That, however, is not a question of *locus standi,* it is a question on the merits. The estoppel may be got rid of by shewing that this creditor has admitted that his proof was liable to be reduced. What the effect of that may be, and whatever else has been done, is a question on the merits.

The only question now is whether the County Court Judge was right in shutting out that investigation. I am of opinion that he was not, and that he ought to have inquired into the facts. Very likely when the facts come to be inquired into there may be no result beneficial to the debtor, but he has a right to have the case which he alleges inquired into. It is said he has no such right, because you cannot look behind the file of the proceedings in the bankruptcy. It is impossible to hold that the file of the proceedings is an estoppel. Of course it is evidence of what appears on the file, but it would be a denial of justice to say you cannot go behind the proceedings in the bankruptcy for the purpose of shewing how they came to exist, or of supplementing them with other facts. I am of opinion, therefore, that the decision of the County Court Judge, that the bankrupt had no right to have the facts investigated, was wrong.

BRETT, L.J.:—

The particular personal undertaking into which a debtor enters when he agrees to pay a composition under sect. 28 gives him such an interest in the amount of the debts as, in my opinion, affords him a *locus standi* to question the amount of any particular debt. The only point really decided by the County Court Judge was the preliminary point that the debtor himself had no such *locus standi*, and that the question ought to have been raised by the trustee. I cannot agree with the learned County Court Judge; I agree with the Chief Judge that the debtor, under the circumstances, has a *locus standi*. Then the only other point which it is material to decide on the present occasion seems to me to be this —whether the file of the proceedings in a bankruptcy is in the nature of a record, and cannot be questioned. It seems to me that it is not in the least in the nature of a record, and that you can go behind it and question it. All the other points which have been raised are not material at the present stage, but may be discussed hereafter.

COTTON, L.J.:—

I am of the same opinion. The only point decided by the County Court Judge was this, that the bankrupt was not in a position to question, if anybody could question, the amount claimed by the Appellants. In my opinion he was wrong. As a general rule, undoubtedly, in bankruptcy, the bankrupt cannot make such an application as this, because his estate is all vested in the trustee. It is the trustee's duty to investigate claims made against the estate, and, if he does not do his duty, application may be made to the Court, either to remove him or to compel him to do his duty. But here there is this special circumstance, that there are resolutions, which have been approved by the Court, by which, instead of the estate being divided amongst the creditors rateably as far as it will go, a composition is to be paid to them, and, in order to enable that composition to be paid, the bankrupt has to provide himself, or by his friends, a further sum of money, and of course the amount which he will have to provide will depend upon the amount of the debts on which the composition is to be paid. Under these special circumstances, in my opinion, it being a question, not what is to be done with the estate vested in the trustee, but what amount in order to get his discharge the bankrupt is to contribute, he has a right, notwithstanding that he is a bankrupt, to have this investigation made. And that really is the only point which we have now to decide.

It may be right, however, to say something as to what I will call the merits of the case. We have not all the facts before us, and we cannot say whether, after what has taken place, the proof of the bankers can be questioned. One point only, I ought to mention, which has been mentioned by the other members of the Court. In my opinion it may be that the facts outside the file of proceedings may shew that, notwithstanding the length of time this claim has been on the file, neither admitted nor rejected, and what took place when the resolutions were passed, the bankrupt, being a person competent to do so, has a right to enter into the question of the amount of the claim. It may be the bankers have a right to say, this proof has been admitted by the trustee in such a way that you cannot reject it, but, on the other hand, it may be that after what has taken place, the bankrupt being, as we have decided, a person competent to enter into an investigation, an investigation is still open to him. We decide nothing, except that the Court must have the facts before it before it can say whether or not an investigation of the amount of the proof can be entered into.

Appeal dismissed with costs.

Solicitors for Appellants: *Morley & Shirreff*, agents for *J. M. Pollard, Ipswich.*

Solicitors for Bankrupt: *Western & Son.*

W. L. C.

C A.

1881

V.-C. M.
Feb. 8.

C. A.
March 26, 28.

PIKE *v.* FITZGIBBON.

[1878 P. 137.]

MARTIN *v.* FITZGIBBON.

[1880 M. 0561.]

General Engagements of Married Woman—Separate Estate—Judgment—Existing Property—Restraint on Anticipation.

18 Ch D 531
540, 545
8 QBD 9
— 178
11 QBD 29
23 Ch D 715
722-4-6

Held, by *Malins*, V.C., that the general engagements of a married woman entitled to separate estate will be enforced by a Court of Equity against such separate estate as she has at the time when judgment is given, including (if her husband be then dead) estate limited to her separate use, without power of anticipation.

Held, on appeal, that they can be enforced only against so much of the separate estate to which she was entitled, free from any restraint on anticipation, at the time when the engagements were entered into, as remains at the time when judgment is given, and not against separate estate to which she became entitled after the time of the engagements, nor against separate estate to which she was entitled at the time of the engagements subject to a restraint on anticipation.

THE action of *Martin* v. *Fitzgibbon* was commenced shortly after the decision of Vice-Chancellor *Malins* in *Pike* v. *Fitzgibbon* (1). The Plaintiffs were bankers with whom Lady *Louisa Fitzgibbon* had kept a separate account which had during her coverture become overdrawn. This overdrawing, as the Plaintiffs alleged, had been allowed on the ground that Lady *Louisa* was known by them to have considerable estates settled to her separate use, and had agreed to repay the advances out of her separate estate. Mr. *Fitzgibbon*, the husband of Lady *Louisa*, died on the 3rd of January, 1880. The main object of the action was to attach the life interest of Lady *Louisa Fitzgibbon* in considerable estates devised by the will of Earl *Clare*, under which Lady *Louisa*, in 1873, became equitable tenant for life in possession for her separate use, with a restraint on anticipation.

The action of *Martin* v. *Fitzgibbon* came on for hearing before Vice-Chancellor *Malins* on the 8th of February, 1881.

Higgins, Q.C., and *T. Stevens*, for the Plaintiffs.

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(1) 14 Ch. D. 837.

Ingle Joyce, for Lady *Louisa Fitzgibbon.*

Beddall, for the trustees of Earl *Clare's* will.

MALINS, V.C., after stating the facts of the case, continued:—

When I gave my judgment in *Pike* v. *Fitzgibbon* (1) I considered it clearly settled that the separate property of a married woman is liable for her general engagements. I then referred to the judgments of the Lords Justices in *Picard* v. *Hine* (2), and to the decree which declared that the separate property of Mrs. *Hine* vested in her, or in any other person in trust for her at the date of the decree, was chargeable with the payment of the sums which she had contracted to pay. That decree is directed, not to the property which she had at the time of the contract, but to the property which she had at the time of the decree, and I followed that in *Pike* v. *Fitzgibbon.* I hold it to be clear that all separate property which she has at the time of the judgment, whether she had it at the time of the debt being contracted or not, is liable to fulfil her general engagements.

A distinction was attempted to be drawn in *Pike* v. *Fitzgibbon*, and was more strongly urged to-day, between property which was settled to her separate use without power of anticipation, and property as to which there was no restraint on anticipation. I entertain no doubt as to the law on this point. The lady could not during coverture bind the income of the Irish estates, which were settled on her for life with a restraint on anticipation. But she was entitled to property for her separate use, and therefore could contract debts. What is the consequence? That all the property which she has when the judgment is given is liable to pay those debts. All I have to look at is—what property has she now? I am not treating the income of the Irish estates as bound by a specific engagement, but I hold that this being property which she is now at liberty to dispose of, is bound by her general engagements to pay her debts out of any property she may afterwards have.

The judgment accordingly declared that all the property of

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(1) 14 Ch. D. 837.

(2) Law Rep. 5 Ch. 274.

Lady *Louisa* then vested in her, or in any person or persons in trust for her, and which immediately before the death of her husband stood limited to her separate use during coverture, including her life interest in the Irish estates devised by the will of Earl *Clare*, was chargeable with the payment of the moneys due to the Plaintiffs. An inquiry was directed what were the particulars of the property comprised in or subject to the above declaration, and a receiver was appointed of the aforesaid property, including any portion of the rents and profits of the Irish estates which but for this judgment would be payable to Lady *Louisa*.

Lady *Louisa Fitzgibbon* appealed from this judgment so far as it affected property subject to a restraint on anticipation. She also appealed from those parts of the judgment in *Pike* v. *Fitzgibbon*, 1. by which it was declared that any separate property as to which she was restrained from anticipation was chargeable with the amounts due to the Plaintiffs under the covenants referred to in the judgment; 2. by which inquiries were directed as to such separate property; 3. by which it was ordered that the Plaintiffs should be at liberty to apply in Chambers for the appointment of a receiver of all or any part of the property, as they might be advised; and 4. by which it was ordered that she should pay to the Plaintiffs their costs incurred subsequently to the 3rd of January, 1880, the date of the death of Mr. *Fitzgibbon*. The case is reported (1).

Lady *Louisa Fitzgibbon* and her husband had by their statement of defence, denied that Lady *Louisa* was entitled to any separate property not subject to a restraint on anticipation, except her life interest in the £15,000 payable under the covenant of the Countess Dowager of *Clare* contained in the settlement of the 4th of August, 1866.

By the judgment it was declared that such of the separate property of Lady *Louisa* as was immediately before the death of her husband on the 3rd of January, 1880, and was at the date of the judgment vested in her or in any other person or persons in trust for her, including any separate property as to which during coverture she was restrained from anticipation, was chargeable with

(1) 14 Ch. D. 837.

the amount due to the Plaintiffs under the covenants contained in certain indentures of the 20th of January, 1875, and the 17th of June, 1875, respectively, and with the Plaintiffs' costs of the action. It was referred to the Taxing Master to tax the Plaintiffs' costs of the action, distinguishing and certifying the amount of the Plaintiffs' costs up to the 3rd of January, 1880, and the amount of their costs since that date. Directions were given to tax the costs of the trustees. The following account and inquiries were directed: 1. An account of what was due from Lady *Louisa* under the covenants; 2. An inquiry of what her said property consisted according to the above direction, and in whom it was vested; 3. An inquiry as to incumbrances on the property. An injunction was granted restraining Lady *Louisa* from dealing with a fund in Court in the Common Pleas Division of the High Court of Justice in *Ireland* in an action of *Pike* v. *Fitzgibbon.* Liberty was given to the Plaintiffs to apply in Chambers for the appointment of a receiver of all or any part of the said property, as they might be advised. Liberty was given to the trustees to retain their costs out of any property of Lady *Louisa's* coming to their hands, and she was ordered to pay to the Plaintiffs their costs incurred subsequently to the 3rd of January, 1880. Further consideration was adjourned, with liberty to apply.

The Irish fund mentioned in the judgment in *Pike* v. *Fitzgibbon* was separate estate, not subject to any restraint on anticipation.

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The two appeals came on to be heard together on the 25th of March, 1881.

Glasse, Q.C., *Davey*, Q.C., and *Ingle Joyce*, for the Appellant:—

The Vice-Chancellor has carried the doctrine as to a married woman's engagements further than it has ever been carried before. There is no jurisdiction to attach property which at the time of the engagement was subject to a restraint on anticipation. An express assignment of it would be clearly void, and a general engagement cannot be put on a higher footing. None of the authorities support the decision: *Johnson* v. *Gallagher* (1); *Roberts*

(1) 3 D. F. & J. 494. 7 Jur N.S. 274.

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v. *Watkins* (1); *Re Sykes's Trusts* (2). A married woman's power of contracting debts to be paid out of her separate estate only extends to separate estate which she can alienate: *Owens* v. *Dickenson* (3). The decision in *Atwood* v. *Chichester* (4) is in our favour. There is no authority for affecting any separate estate but what the married woman had at the time of the engagement.

Higgins, Q.C., and *Begg*, for the Plaintiffs in *Pike* v. *Fitzgibbon*, and

Kay, Q.C., *Higgins*, Q.C., and *T. Stevens*, for the Plaintiffs in *Martin* v. *Fitzgibbon*:—

We contend that under the general engagements of a married woman all property which is separate estate, and which at the date of the judgment is free from any restraint on anticipation, can be attached. The form of the decree in *Picard* v. *Hine* (5) shews this, and *Davies* v. *Jenkins* (6) supports that view. The separate estate is made liable without any express reference being made to it: *Mayd* v. *Field* (7); *Collett* v. *Dickenson* (8); *London Chartered Bank of Australia* v. *Lemprière* (9); *Murray* v. *Barlee* (10); *Morrell* v. *Cowan* (11); *Clive* v. *Carew* (12). There is then no reason why the claim should be confined to separate estate which the married woman has at the time of the engagement. A Court of Equity treats a married woman as capable of contracting debts; it does not make them a charge on her separate property, but gives execution against it. She is treated as a *feme sole* in respect of separate estate: *Hulme* v. *Tenant* (13); *Johnson* v. *Gallagher* (14). If the engagements are only enforceable against separate estate which she had when they were entered into, inextricable confusion would result. Some of her engagements would be enforceable only against one part of her estate and others against

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(1) 46 L. J. (Q.B.) 552.
(2) 2 J. & H. 415.
(3) Cr. & Ph. 48.
(4) 3 Q. B. D. 722.
(5) Law Rep. 5 Ch. 274.
(6) 6 Ch. D. 728.
(7) 3 Ch. D. 587.
(8) 11 Ch. D. 687.
(9) Law Rep. 4 P. C. 572.
(10) 3 My. & K. 209.
(11) 6 Ch. D. 166; 7 Ch. D. 151.
(12) 1 J. & H. 199. 5 Jur N.S. 487
(13) 1 Bro. C. C. 15.
(14) 3 D. F. & J. 494, 516. 7 Jur N.
278. 279

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another part, and it would be necessary to arrange the creditors in classes. A married woman can assign her separate property so as to defeat her creditors, and it is only reasonable that the creditors should have the benefit of attaching whatever property she has when they come to enforce their demands. Property subject to a restraint on anticipation still is separate property; the married woman has then power to contract debts, and when the restraint is removed the debts may be enforced against it. The decision of the Vice-Chancellor has been followed in *Flower* v. *Buller* (1). *Godfrey* v. *Harben* (2) is a strong authority for the extended view of the effect of the general engagements of a married woman. In *Roberts* v. *Watkins* (3) and *Re Sykes's Trusts* (4), the married woman had not any separate estate except what was subject to a restraint on anticipation.

[*Vaughan* v. *Vanderstegen* (5), *London and Provincial Bank* v. *Bogle* (6), and *Wright* v. *Chard* (7) were also referred to.]

W. Barber, and *Beddall*, for trustees.

James, L.J.:—

In this case, had it not been for the elaborate judgment of the Vice-Chancellor and the very elaborate and ingenious arguments which have been for so many hours addressed to us, I should have thought that the question was absolutely free from doubt, and incapable of effectual argument in respect of that which is the real and substantial matter of the appeal, that is, as to whether there can be any charge against the estates of which the lady was tenant for life, with a restraint upon anticipation. Twist it in any way you like the conclusion which the Vice-Chancellor arrived at, and which we are asked to arrive at, is that a married woman restrained from anticipation can anticipate. That is the result, if it is put into plain English, because whether it is done by deed or by letter, or by the creation of a debt which in the result operates to charge the property, it is an anticipation of the pro-

(1) 15 Ch. D. 665.
(2) 13 Ch. D. 216.
(3) 46 L. J. (Q B.) 552.
(4) 2 J. & H. 415.
(5) 2 Drew. 165.
(6) 7 Ch. D. 773.
(7) 4 Drew. 673. 5 Jur NS. 1335

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perty, by which the lady deprives herself of something which she otherwise would receive. That this is anticipating her future income would seem to me to be too plain a proposition to be seriously contested. Another point also has been raised, of which we must dispose, and which has arisen, as it seems to me, from a a misapprehension of some of the cases. It is said that a married woman having separate estate has not merely a power of contracting a debt to be paid out of that separate estate, but, having a separate estate, has acquired a sort of equitable *status* of capacity to contract debts, not in respect only of that separate estate, but in respect of any separate estate which she may thereafter in any way acquire. It is contended that because equity enables her, having estate settled to her separate use, to charge that estate and to contract debts payable out of it, therefore she is released altogether in the contemplation of equity from the disability of coverture, and is enabled in a Court of Equity to contract debts to be paid and satisfied out of any estate settled to her separate use which she may afterwards acquire, or, to carry the argument to its logical consequences, out of any property which may afterwards come to her. In my opinion there is no authority for that contention, which appears to arise entirely from a misapprehension of the case of *Picard* v. *Hine* (1), and one or two other cases which follow it, in which this point was never suggested. The language of the decree in *Picard* v. *Hine*, which gave the Plaintiff a charge upon the separate estate remaining, was intended to give effect to the rule that the creditor had a claim against the estate, but not a charge upon it so as to prevent the operation of an intermediate alienation, and therefore the inquiry was directed what separate estate remained, meaning only what part remained of that separate estate in respect of which the married woman had at the time of contracting the the debt a *jus disponendi*. That is evidently what was before the Court, no such point having been suggested as that she had acquired the general power of contracting debts to be paid out of any separate estate she might afterwards acquire. The misconception has arisen from not attending to what were the facts of the cases in which that inquiry was directed. I desire to have it distinctly understood as my opinion, and the opinion of my colleagues, and therefore as the decision of this Court, that in any future case the proper inquiry to be inserted is what was the separate estate which the married woman had at the time of contracting the debt or engagement, and whether that separate estate or any part of it still remains capable of being reached by the judgment and execution of the Court. That is all that the Court can apply in payment of the debt. The decision in *Johnson* v. *Gallagher* (1) was that the debt of the married woman, although she had separate estate, did not prevent her disposing of that separate estate any more than the contracting a debt prevents a man from disposing of any part of his estate.

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(1) Law Rep. 5 Ch. 274.

I am of opinion that the decree in *Pike* v. *Fitzgibbon* (2) must be varied by substituting in the declaration the word "excluding" for "including" before the words "any separate property." It is stated that the Appellant has not since the date of her engagements acquired any property settled to her separate use without a restraint on anticipation, and she therefore has not by her appeal asked to vary the judgment as regards subsequently acquired property. It is, therefore, sufficient to state as a warning in any future case that the only separate property which can be reached is the separate property, or the residue of the separate property, that a married woman had at the time of contracting the engagements which it is sought to enforce.

Brett, L.J.:—

I am of the same opinion, and I think it right to state with deference the reasons which have led me to that conclusion. At common law, for reasons of high social policy, a married woman is not allowed to make any contract binding upon herself or upon any property of hers; in fact, the common law did not recognise that she had any property or could do any act binding herself. It seems to me, after having read the cases referred to and listened to the arguments, that it is not true to say that equity has recognised or invented a *status* of a married woman to make contracts; neither does it seem to me that equity has ever said

(1) 3 D. F. & J. 494. 7 Jur NS 172

(2) 14 Ch. D. 837.

that what is now called a contract is a binding contract upon a married woman. What equity seems to me to have done is this, it has recognised a settlement as putting a married woman into the position of having what is called a separate estate, and has attached certain liabilities not to her but to that estate. The decisions appear to me to come to this, that certain promises (I use the word "promises" in order to shew that in my opinion they are not contracts) made by a married woman, and acted upon by the persons to whom they are made on the faith of the fact known to them of her being possessed at the time of a separate estate, will be enforced against such separate estate as she was possessed of at that time, or so much of it as remains at the time of judgment recovered, whether such judgment be recovered during or after the cessation of the coverture. That proposition so stated does not apply to separate estate coming into existence after the promise which it is sought to enforce. It was contended by Mr. *Higgins* that if the law as it exists up to this time does not affect separate estate coming into existence after the promise, the Court ought now to hold that it does, and so to make new law. That is a proposition to which I have the strongest objection. It seems to me that the days are at an end when any Court in this country ought intentionally to make new judicial legislation. The decisions which seem to me to support the proposition which I have stated do not apply to any other estate than that which is described in that proposition. I therefore venture to differ from so much of the judgment of the Vice-Chancellor as says that the proposition applies to separate property coming into existence after the time of the engagement, even though it be not subject to a restraint on alienation. It seems to me that the after-acquired property is a different estate from the other, and no decision of Courts of Equity has ever held that the doctrine which is applicable to the one estate should be applied to the other, and I should decline, unless obliged, to go further in that direction. Moreover, it seems to me that even if we could go further, the terms of this new estate, where there is no power of anticipation, would take that estate out of the principle applicable to the other, and that to hold that such an estate is subject to these liabilities would be in fact to strike out the words "without power of anticipation." The cases of *Roberts* v. *Watkins* (1) and *Re Sykes's Trusts* (2) are adverse to the case of the Plaintiffs, and with those decisions I entirely agree.

COTTON, L.J.:—

In this case the Vice-Chancellor directed an inquiry as to property held to the separate use of the lady, whether she was entitled to it at the time the contracts relied on by the Plaintiffs were entered into or not, including property which was settled to her separate use without power of anticipation. The only part of the decree against which there is an appeal is that part of the decree which gives the Plaintiffs a right to have their debts paid out of that portion of the separate estate as to which there is a restraint on anticipation. It is unnecessary to correct the form of the decree as regards the other part, but we must decide the question involved in it, as it has a material bearing on the principle of the other part of the judgment, against which there is an appeal. It would be most strange if, as regards the property as to which there was a restraint on anticipation, the Plaintiffs could prevail. Their contention must amount to this, that the married woman under the trusts of the will was prevented only from doing any act which would prevent her from enjoying during the coverture the income of this property, and that she could do acts even during coverture which might intercept the income of the property after the death of her husband. The express terms of the trust are that she shall have no power while under coverture to dispose of the property by way of anticipation; would not a disposition to take effect after the death of her husband be an anticipation just as much as if it was to take place in the year after that in which the disposition was made? It is almost a *reductio ad absurdum* to say that although she could not anticipate by an express charge on the property, yet she could dispose of it by way of anticipation by contracting during the coverture a debt not directly charging the property but giving the Plaintiffs a right to claim it. I think that the ingenious and able argument on the part of the Plaintiffs has proceeded on one or two fallacies in the use of language. As I understand their argument it is this, that a Court of Equity

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(1) 46 L. J. (Q.B.) 552.

(2) 2 J. & H. 415.

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deals with a married woman who has separate estate as if she were a *feme sole.* Now, is that correct? First of all there is one clear and absolute distinction. Can a *feme sole,* or can a man, be restrained from anticipating, or disposing by way of anticipation, of any property to which she or he is entitled? No. A married woman under coverture can; but how and why? Simply as regards property settled to her separate use, and because equity can modify the incidents of separate estate, which is the creation of equity, and thus the position of a married woman having separate property differs materially from that of a *feme sole.* Is it true that she is regarded in equity as a *feme sole?* She is regarded as a *feme sole* to a certain extent, but not as a *feme sole* absolutely, and there is the fallacy. She, in my opinion, is regarded as a *feme sole* only as regards property which, under the trust, she is entitled to deal with as if she were a *feme sole,* but as regards property which she is restrained from anticipating, she is not, as regards persons other than her husband, in the position of a *feme sole.* As regards her husband, no doubt she is, as regards property settled to her separate use (whether there is a restraint upon anticipation or not), treated as a *feme sole,* that is to say, she, and not her husband, is the person who alone can receive and give a discharge for the money, and her husband is absolutely excluded; but as regards the outside world she is not regarded as a *feme sole* in respect of property subject to a restraint upon anticipation. The judgment of Lord Justice *Turner* in *Johnson* v. *Gallagher* (1) shews the doctrine and principle to be, that as regards property settled to her separate use, and which she has the power of dealing with as a *feme sole,* she is treated, for the purposes of assignment or for the purposes of her general engagements, as if she were a *feme sole*, but as regards that property only. His Lordship says (2): "Courts of Equity, on the other hand, have, through the medium of trusts, created for married women rights and interests in property, both real and personal, separate from and independent of their husbands. To the extent of the rights and interests thus created, whether absolute or limited, a married woman has, in Courts of Equity, power to alienate, to contract, and to enjoy, in fact, to use the language of all the cases from the earliest to the latest, she is considered in a Court of Equity as a *feme sole* in respect of property thus settled or secured to her separate use." That is to say, as regards property which, under the trusts, she can dispose of and alienate she is considered as a *feme sole*. That must of necessity mean that she is treated as a *feme sole* as regards that property as to which, at the time of entering into her contracts, she is so circumstanced. Looking to these words in the judgment, which clearly apply only to property as to which there is no restraint on anticipation, and looking at the terms of the concluding sentence, it does not mean that a married woman having separate estate is treated as a *feme sole*, but only that she is treated so as regards her power of dealing with the property to which she is entitled to her separate use without any restraint on anticipation, and as regards the consequences on that property of her general dealings she is to be considered as if she were a *feme sole*. That, I think, gets rid of the argument of the Plaintiffs, for if a married woman having separate property is to be considered as a *feme sole*, so that her engagements can be made available not only as against the separate property she has at the time of the engagement but against that which she has at the time when the judgment is sought to be enforced, I do not see why, after the determination of the coverture, all property held in trust for her, whether settled to her separate use or not, should not be made available in a Court of Equity. It was said that the right would exist only as against subsequently acquired separate estate, because separate estate is a creation of a Court of Equity. But why is not other trust property, when she is discovert, exactly in the same position? The separate estate and the restraint on anticipation no doubt exist during discoverture in this way, that upon a subsequent coverture they will revive and be operative, but at the time the restraint on anticipation is inoperative and she can dispose of the property, not under the trusts which secure it to her separate use, but simply because she is a *feme sole*, and all restraints upon anticipation or alienation are bad. If the contention on the other side is to prevail, not only this property but all her property, which can only be reached by the aid of a Court of Equity, ought to be included in the inquiry. In my opinion that fallacious use of the expression that a married

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(1) 3 D. F. & J. 494. 7 Jur NS 278

(2) 3 D. F. & J. 509. 7 Jur NS 277

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woman having separate estate is regarded as a *feme sole* has given rise to a great part of the argument on behalf of the Plaintiffs.

Another point made by the Plaintiffs is that here is an equitable execution and that it ought to apply to everything which the Court of Equity can reach at the time. The answer to that is, that the engagement of a married woman is one which a Court of Equity treats her as having power to make solely as against the property which at the time was settled to her separate use with no restraint on anticipation, and as regards any property subsequently coming in, although it might be reached by a Court of Equity by way of equitable execution, it is property which, at the time of the contract in question, was not the estate of the married woman, and therefore not property to be made available in a Court of Equity in respect of an engagement which as against that property is no contract at all.

As regards the case of *Godfrey* v. *Harben* (1) which was pressed upon us, that to some extent favours the contention of the Respondents. I think it better not to give any opinion on the point there decided, as it may come to the Court of Appeal, but that case went very much further than the case it was supposed to follow. As I understand that case, the decision was that the power of appointment by will connected with the separate life estate, when exercised, made the appointed property separate property. In the case of the *London Chartered Bank of Australia* v. *Lemprière* (2), there was power to appoint by deed or will, which makes a great difference between that case and the case before Vice-Chancellor *Hall*. However, I express no opinion upon that case, except to point out that distinction, leaving the case entirely free if and when it comes before the Court of Appeal.

JAMES, L.J.:—

I may say, as regards the two cases of *Flower* v. *Buller* (3) and the case of *Roberts* v. *Watkins* (4), that in the former case Mr. Justice *Denman* must be understood as merely following what he

(1) 13 Ch. D. 216.
(2) Law Rep. 4 P. C. 572.
(3) 15 Ch. D. 665.
(4) 46 L. J. (Q.B.) 552.

thought was the decision of Vice-Chancellor *Malins,* and the judgment of Lord Justice *Lush* in the latter case seems to me from beginning to end to be expressed with absolute accuracy.

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Solicitors for Appellant: *Harting & Son.*

Solicitors for other parties: *Duffield & Bruty; C. W. Stevens; Beaumont & Warren; Bray & Warren.*

H. C. J.

In re BRITISH SEAMLESS PAPER BOX COMPANY.

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April 5.

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Company—Winding-up—Liability of Directors—Fiduciary Relation—Company intended to be worked as a Private Partnership—Shareholders subsequently admitted.

A company was formed and registered consisting of eight persons, seven of whom were directors and the eighth the solicitor, for the purchase and working of a patent belonging to some of the members. The directors allotted shares without consideration to some of their number. It was proved to the satisfaction of the Court that it was intended at that time to work the company as a private partnership, and to admit no other members. All the members consented to what was done, and it was sanctioned at a general meeting of the company. No prospectus was issued. Rather more than a year afterwards, the company being in need of more capital, some fresh shareholders were admitted, who alleged that they were not informed of the manner in which the original shares had been allotted. The company was ordered to be wound up:—

Held (affirming the decision of *Jessel,* M.R.), that no fraud had been committed on the company, and that the official liquidator, as representing the company, could not call upon the directors under the 165th section of the *Companies Act,* 1862, to account for the value of the shares so allotted to them.

Society of Practical Knowledge v. *Abbott* (1) distinguished.

ON the 7th of January, 1874, an agreement was made between three American gentlemen named *S. Wheeler, E. Jerome,* and *P. Merick,* who were the owners of an English patent for a machine for making seamless paper boxes, and Mr. *F. Ransome,* an English engineer, by which it was agreed that a company should be formed for purchasing the patent and working it in *England;* that *Ransome* should advance £2000 towards the working expenses; that the capital of the company should consist of £50,000, in shares of £1 each, of which 18,000 should be reserved for issue to such persons as the directors might approve, and 2000 should be allotted to *Ransome* in consideration of his advance; and the remaining 30,000 should be allotted to the parties to the agreement, of which the three Americans were to have 24,000 and *Ransome* 6000. But if the company should decline to purchase and work the patent, one-fifth of the patent was to be assigned to *Ransome.*

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(1) 2 Beav. 559.

By an agreement dated the 27th of February, 1875, and made between Messrs. *Wheeler, Jerome,* and *Merick* (therein called the vendors), of the one part, and *W. H. Bennett,* as a trustee for the proposed *British Seamless Paper Box Company,* of the other part, it was agreed that the vendors should sell to the company their letters patent and machinery for the sum of £32,000, of which £2000 was to be deemed to be the price of the machinery; that all or any part of the said sum of £32,000 might be discharged by issuing fully paid-up shares in the company at their nominal value, and that on the allotment of such shares the vendors would assign the patent and machinery to the company.

A meeting of the promoters was held on the 1st of March, 1875, at which the three Americans, *Ransome,* and three gentlemen named *Stevens* were present, and a minute was entered to this effect:—"The memorandum and articles of the company were signed. Two letters comprising arrangement between Mr. *Ransome* and the inventor for superseding the agreement of the 7th of January, 1874, were signed by Mr. *Ransome* and Mr. *Merick* respectively."

These letters were not in evidence, nor was any further explanation given of them.

The company was registered on the 4th of March, 1875, with a nominal capital of £50,000, in shares of £100 each instead of shares of £1 each. The agreement of the 27th of February, 1875, was referred to in the memorandum of association, which defined one of the objects of the company to be to adopt it and carry it into effect; but no allusion was made to the agreement of the 7th of January, 1874.

The first directors of the company named in the articles were *Wheeler, Jerome, Merick, Ransome, W. Stevens, W. Stevens,* jun., and

G. N. Stevens. These seven persons, and in addition Mr. *Tindell,* the solicitor of the company, subscribed the articles of association for one share each.

At a meeting of the directors on the 11th of March, a discussion took place as to a sum of £1000 which ought to have been advanced by Mr. *Ransome,* but of which he had only paid £250, for preliminary expenses; and it was arranged that he should take ten shares, that the £250 should be treated as part payment on account of the shares, and that the remaining £750 should be treated as a debt due from him.

On the 14th of April, 1875, an agreement was executed between the vendors and the company that the vendors should accept 320 fully paid-up shares in payment of their purchase-money, of which 300 were to be payment for the patent, and twenty for the machinery. This agreement was duly registered before it was acted upon.

On the 15th of April a meeting of the directors was held, at which 320 fully paid-up shares were allotted to *Merick* on behalf of the vendors, and then, at the request of *Ransome, Merick,* in pursuance of an agreement between himself and *Ransome,* transferred thirty-five shares to *Ransome* and fifteen shares to each of the three Messrs. *Stevens,* for a nominal consideration only.

At the first general meeting of the company, which consisted only of the directors and Mr. *Tindell,* above mentioned, the dealings of the directors with the shares were reported and approved. No prospectus was issued by the company, nor did the original members invite any other persons to take shares; and the directors in their affidavits stated that the company was formed and was intended to be carried on as a private company, and not as a company in which the public or any persons, except those by whom the company was formed, were to be invited to subscribe and intended to have any interest. And with that object the directors passed a resolution on the 8th of March, 1875, that the present members should have the option, instead of paying calls on shares which they might already have, of taking fresh shares and paying a deposit on them. Messrs. *Stevens* also stated that the shares transferred to them were, as to ten shares each, in consideration of money advanced by them to *Ransome* to enable him to pay the money he had agreed to pay towards the preliminary expenses, and as to five, was a bonus for services they had rendered.

W. Stevens afterwards obtained sixty-five other paid-up shares by transfer from *Merick*, under an agreement with the vendors, for a share in the working of the invention in places beyond the *United Kingdom.*

In the month of June, 1876, it became evident that the company must raise further capital, and eventually, on the 3rd of July, 1876, Mr. *C. Gibbs* and three other gentlemen took five shares each, and Mr. *J. P. Leith* took ten shares. At the same time Messrs. *Stevens* took ten shares each. All these shares were paid for in cash. The company never actually carried on business, the machinery not having been found sufficient for the purpose, and eventually it was wound up by an order of the Court.

The official liquidator took out a summons under the 165th section of the *Companies Act*, 1862, to the following effect—That it might be declared that *Ransome, W. Stevens, W. Stevens*, jun., and *G. N. Stevens*, who were respectively directors of the company, were guilty of misfeasance and breach of trust in relation to the company, in obtaining or accepting the shares set opposite their names (namely, *Ransome* thirty-five shares, *W. Stevens* eighty shares, *W. Stevens*, jun., fifteen shares, and *G. N. Stevens* fifteen shares), in accepting and carrying out the agreement of the 27th of February, 1875, and that they might be ordered to pay the value of the shares at the nominal value; and also that the directors might be made answerable for any loss which may have happened to the company through carrying out the agreement.

Affidavits were filed in support of the summons by *Gibbs* and the other members who took shares in July, 1876, stating that they were not informed of the manner in which the 320 shares had been disposed of, and charging the directors with misapplication and concealment of the state of the affairs of the company.

The summons was heard before the Master of the Rolls on the 27th of January, 1881.

Whitehorne, for the official liquidator, cited *Society of Practical Knowledge* v. *Abbott* (1), *In re Englefield Colliery Company* (2).

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(1) 2 Beav. 559.

(2) 8 Ch. D. 388.

Phosphate Sewage Company v. *Hartmont* (1), and *New Sombrero Phosphate Company* v. *Erlanger* (2).

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Chitty, Q.C., *Sangster Green*, and *Byrne*, for the Respondents, were not called upon, but in reply to the question by his Lordship, said they did not ask for costs.

JESSEL, M.R. :—

I do not think it necessary to hear the Respondents as they do not ask for costs.

First of all, as far as I know, there is no case like this. If there were, I should only be too glad to follow it. It is an entirely new case, and entirely distinguishable from that of the *Society of Practical Knowledge* v. *Abbott* (3), before Lord *Langdale*, which was a very peculiar case. It was simply this: The company was a chartered company, and by the terms of the charter the shares were to be paid for in cash, and in no other way. The four gentlemen who obtained the charter allotted the shares to themselves without paying for them in cash, and sold them to other people, and then the corporation sued them for the balance of cash due on their allotments. Lord *Langdale* held that, having regard to the terms of the charter of the corporation, these four gentlemen had no right to allot the shares to themselves except for cash, and therefore that the claim made by the bill was well founded.

That case does not appear to me to have the slightest application to a company formed as this is. The other case of *New Sombrero Phosphate Company* v. *Erlanger* appears to me also to have no application. I quite agree to this, that if promoters make an arrangement to get a profit for themselves out of what is apparently paid to the vendors, it is immaterial whether the contract with the vendors is approved of by the directors of the company, who are the promoters, just before the allotment or just after: in both cases it is intended to cheat the future shareholders; and of course it makes no difference whatever that the persons who, at the time the allotment was made, were in fact the pro-

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(1) 5 Ch. D. 394.
(2) 5 Ch. D. 73; 3 App. Cas. 1218.
(3) 2 Beav. 559.

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moters or their nominees, knew of the fraud. You can defraud future allottees as well as present allottees. Therefore that case appears to me to have no direct bearing upon the case before me.

What, then, is this case? I must say I am convinced of the thorough honesty of all parties engaged in the transaction. Of course, to a certain extent, the honesty of the parties engaged in a particular transaction must naturally affect the case in the mind of the Judge who has to consider the transaction; but, as far as I am concerned, I always endeavour to administer justice fairly, according to law, even if it should bear hardly on people, as it sometimes does. I say "fairly," because my mind is affected—as every Judge's mind must be affected—to some extent, at all events, by what I will call the "morality" of the transaction. I should be more anxious to find reasons to trounce a rogue than I should be to find reasons to rob an honest man.

The present question is this: Three Americans, who appear to be inventors, were possessed of a certain patent. Whether it is valuable or not I do not know—it has not been successfully worked in this country; but it was supposed to be valuable. An English engineer of the name of *Ransome* appears to have had some faith in it; at all events, he agreed to advance £2000 for the purpose of introducing a machine into this country to make seamless paper boxes according to the patent. This he agreed to do under an agreement in writing of a very curious character, and the effect of which it is very difficult to state in a few words. The agreement is dated the 7th of January, 1874. In substance it was this, I think: that he was to advance £2000 to get the machine at work; if he got it to work satisfactorily the company was to be formed, he was to get £2000 worth of shares for his £2000 advanced, the three Americans were to get £30,000 in shares out of a total capital of £50,000, and out of those shares Mr. *Ransome* was to receive £6000; but if the machine turned out a failure, and through no fault of Mr. *Ransome's*, he was then to be entitled to have a fifth of the patent. So that the moment this agreement was signed Mr. *Ransome* was to be treated as substantial owner of one-fifth part of the patent. That was the substance of the agreement.

Then a meeting of the promoters was called, at which three other gentlemen were present. They divided the interest with the Englishman, and they agreed to get up a company on the footing of this agreement of 1874; they not only knew all about it, but their arrangement was to form a company on that footing; and it having been arranged to form what I will call for this purpose a private company—for it was not intended to come before the public at all—a formal agreement, not a real agreement, was made on the 27th of February, 1875, between the three Americans of the one part, and a Mr. *Bennett*, who was their nominee, of the other part, for the nominal sale to the company of the patents for £32,000 in shares. Of course this was a mere bit of form, with the view of launching the company. The company was registered on the 4th of March, and contemporaneously they prepared a memorandum of association to carry out the formal agreement, with articles of association making all the members of the company directors, with the exception of the solicitor, who knew all about the formation of the company and was the only additional person who came in to sign the memorandum of association. The result was that, at the time of the formation of the company, the company consisted of eight men, and it was not intended to consist of any more. There was power, of course, to issue the remainder of the shares, but the intention of these eight men was to carry on the company with these shares, and accordingly we find this, that there is a meeting of directors after the company is formed, ratifying the formal agreement of 1875 and allotting the shares, and allotting them on the principle of recognising the agreement of 1874, of which they were all aware, and which is actually mentioned by its date in one of the early meetings of the directors: so that they recognise Mr. *Ransome's* right to be treated as one of the vendors, and to be paid his share of the purchase-money.

That being so, it appears—though not so clearly as might be—that the other directors thought that Mr. *Ransome* had incurred expenses to the extent of £3000; but when they found that he had only paid £2000, they insisted that the other £1000 should be applied by him in taking up £1000 worth of shares, which he did; and then, again, a few days after the formation of the company, it seems that five shares apiece extra were given to the Messrs.

Stevens (I will assume that it was a bonus), apparently with the knowledge of everybody, in consideration of their having furnished the capital, which they in fact did.

Now, if this company had been intended to be formed as a company in which the shares were to be taken by the public, and a prospectus had been issued immediately after these transactions, concealing them from the allottees, and the allottees had come in, and afterwards, with reasonable promptitude, repudiated the contract, I think a great deal could have been said in favour of their contention; but that is not the case. The company went on, as they intended to go on, with these eight people. In 1875 there is a regular general meeting of the company, and the seal of the company is put to the register of shareholders, treating it as then complete. I then find another regular meeting of shareholders held on the 30th of June, 1876, and at that time there are still only eight shareholders, so that the position of the company up to June, 1876, was this, that every member of the company was perfectly well aware of the whole of the transaction. It was confirmed in March, 1875, and the members carried on business for the whole period—that is, from March, 1875, to June, 1876—without attempting to repudiate the transaction, even if they could have repudiated it.

What then was the position of the company—not the promoters only—as regards the vendors and as regards Mr. *Ransome*? They are actually the same people with the exception of Mr. *Tindell*, but the company itself had adopted this contract of 1874 with full knowledge of every member of it (which is a case I never heard of before), without any intention of bringing in any other shareholder, without any notion of defrauding any future allottee, and had made this bargain with knowledge of the facts. Is it possible to say that the company is not bound by that? It would be impossible to say so. The transaction was entirely *bonâ fide* in every respect.

What occurred subsequently was this: In June, 1876, the company wanted more capital; Messrs. *Stevens* and the other English shareholders were willing to contribute a little more, but not enough; five gentlemen, who were strangers, then came in and joined the company, and they had an allotment of shares to a considerable amount no doubt, but not to a large amount. I agree it would have been right that the agreement of 1874 should have been stated in the memorandum and articles of association, and that is one reason why I am not disposed to give costs to these gentlemen, because I think their neglect in not so stating it has induced the liquidator to make this application; but, even assuming (and this is a point upon which I give no opinion, because I have not heard the evidence fully) that the people who subsequently came in did not know what the original transaction was, they would have no right to bring an action on the facts, and say they were thereby induced to become members of the company; that is, if they were defrauded at all. I give no opinion as to what their state of knowledge was, because there is a conflict of evidence about it; but I cannot see that that would make those persons guilty of misfeasance who had actually entered into a contract with a *bonâ fide* company carrying on business, every article of which contract was known to every member of the company.

It appears to me that on the 30th of June, 1876, the company, having acted on the contract with that knowledge, the subsequent allotment of a portion of the shares not being part of the scheme originally contemplated, were not bound to alter the relations between the company and their vendors, and consequently that this application which is made by the liquidator under the 165th section of the *Companies Act*, 1862, must fail.

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From this judgment the official liquidator appealed. The appeal was heard on the 5th of April, 1881.

Whitehorne, for the Appellant:—

In an ordinary company there is no pretence for saying that the transaction complained of would be supported. There was no consideration for the allotment of the shares to the Respondents. The agreement of February, 1875, was in fact a mere sham. There was no real sale of the patents to the company, for all the promoters were interested in them. The five shares allotted to the Messrs. *Stevens* were on their own admission simply a bonus. The Respondents were directors of the company and stood in a fiduciary relation, not only to the members at the time of the transaction,

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but to all others who might come in: *Society of Practical Knowledge* v. *Abbott* (1); *New Sombrero Phosphate Company* v. *Erlanger* (2). It is true that if a company is of such a nature that no future shareholders can be admitted and all the members agree to a transaction, it cannot be impeached at the instance of the liquidator on behalf of the company. That is the *ratio decidendi* of *In re Ambrose Lake Tin Mining Company* (3); *In re Gold Company* (4). But in the present case there were shares kept in reserve, and in fact only a few months afterwards new shareholders were admitted, and they complain that the transactions complained of were concealed from them and that they were deceived. If this decision is supported it will open a door for fraud, for it will be easy for directors to do as they please with the shares and then to say that it was at the time intended to work the company as a private company.

Chitty, Q.C., and *Sangster Green*, for the Messrs. *Stevens*, and

Byrne, for *Ransome*, were not called on.

JAMES, L.J.:—

It appears to me that the Master of the Rolls has really put the matter on the true footing in that passage of his judgment in which he makes the question resolve itself into one of honesty or dishonesty. He was of opinion, and I agree with him, that the directors were, and intended to be, thoroughly honest, and that they were, and intended to remain, the sole proprietors of the property of the company and the sole members of the company, and that whatever agreements they chose to make among themselves as to the division of the property, concerned themselves alone. That being so, it distinguishes this case from the case of the *Society of Practical Knowledge* v. *Abbott*, because in all these cases, when anything like a bonus has been given to directors, and it is called in question by allottees of shares, the burden of proof is thrown on those who have received it, to satisfy the Court that it was intended to be and was in fact honestly received. If they were intending, although then constituting the whole company, that other people should come in afterwards to whom what had been done would be injurious, the Court would feel no difficulty in saying, as Lord *Langdale* did in the *Society of Practical Knowledge* v. *Abbott* (1), that they intended to commit a fraud. Here there was nothing of that kind. That is the ground taken by the Master of the Rolls, and I concur in his opinion. It is said that our decision in favour of these directors may open a door for dishonest practices in future. But I think we ought not to punish an honest man for an action in order that it may discourage dishonest men from doing something like it. The appeal must be dismissed with costs.

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(1) 2 Beav. 559.
(2) 3 App. Cas. 1218.
(3) 14 Ch. D. 390.
(4) 11 Ch. D. 701.

BRETT, L.J.:—

This is an application under the 165th section of the *Companies Act*, calling upon Messrs. *Stevens* and *Ransome* to pay the nominal value of certain shares which have been transferred to them as fully paid-up shares. The only words of the 165th section which justify the application are those which make a director liable "where he has been guilty of any misfeasance or breach of trust in relation to the company." The kind of misfeasance charged in this case is that these directors, while assuming to act on behalf of a company for purchasing a patent, had themselves an interest in the patent and contrived to get an advantage for themselves, and that they intended to keep this advantage secret from the members of the company for whom they were assuming to act. If so, there was, no doubt, a fraud. If when parties are promoters of a company and then become directors, and at the time when they are making a profit to themselves are intending to act not only for the then members of the company but for future members, and they keep it secret, they can be made liable to account by future shareholders under the 165th section. That has been often decided. But if at the time when they entered into the transaction they really intended that everybody should be made acquainted with what was done, or if they only intended to act for themselves and for others who knew all about the matter, that does away with all fraud, and if there is no fraud they cannot be charged with misfeasance under the statute. The Master of the Rolls' judgment is founded on this, that at the time when this transaction was entered into and completed, not only did every member of the company know of the transaction and accept it, but it was not in the mind of anybody that any one else should become a member of the company. If that was the intention of all parties at the time, it is impossible to say that there was any secrecy, and there being no secrecy, and everybody consenting, there could be no fraud. I think that is sufficient ground for our decision. If we were to decide otherwise, we should be saying that a transaction which is perfectly honest at the time and intended to be final, can after a lapse of time be made dishonest by what has taken place afterwards. To say that you can make facts relate back so as to make an act dishonest which was honest at the time when it was done, appears to me monstrous.

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(1) 2 Beav. 559.

It is said that if this transaction is upheld it will open a door to fraud, that is to say, that we are to make innocent persons suffer lest, if dishonest persons commit a fraud in a similar case, the Court should not be astute enough to find them out. I agree that if shortly after such a transaction directors admitted new shareholders, it would be strong evidence that they intended at the time to take in new members, and unless all the circumstances are disclosed to them the directors might be made liable for misfeasance, because it would be inferred that they intended to act for the future members as well as the present. But that is negatived by the evidence in the present case.

Cotton, L.J.:—

I also think that the decision of the Master of the Rolls was right. There are two questions raised by this summons, but only one was pressed, namely, that *Ransome* and the other Respondents should be made answerable for the full nominal value of the shares transferred to them. We have not heard counsel on behalf of the Respondents, but subject to what they may have urged, I should have said that if this had been an ordinary company in which there was an intention to admit new members and offer the shares to the public, the official liquidator would have been entitled to call on the directors to account for the value of their shares. But on what principle? It is that the directors stand in a fiduciary relation to the whole company, that is, not only to the existing members but to all whom they intend to bring in. A trustee cannot make a profit for himself without the full knowledge of all his *cestuis que trust*, and so the directors of a company formed in the ordinary way stand in a fiduciary relation not only to those who are members at the time but to all who may come in afterwards. But here it is an established fact that when the company was formed it was intended to be a private company, that is, it was intended to carry it on without calling in the public, or issuing any shares except to the then existing shareholders. Therefore the doctrine that directors may not make a profit for themselves is inapplicable, because all the members knew that they intended to make a profit. It is true that some new members were subsequently taken in. If shortly after this transaction a prospectus had been issued and the public had been invited to come in and take shares, no Court would have listened to directors who said that it was not intended to take in fresh members. But this was commenced and carried on entirely as a private company, and a considerable time elapsed before they asked any one to join them. Then there was a general meeting of the company. I doubted at first whether, if there had been no general meeting, the transaction could have been considered to have been confirmed by the company. But there was a general meeting, and the transaction was approved by it. I am of opinion that under these circumstances it cannot now be questioned.

I wish to make an observation on one other point. It is stated in the affidavits of the new members that the directors concealed and misrepresented facts, and but for such concealment and misrepresentation they would not have taken their shares. In my opinion, even if that be so, you cannot for that reason assume that there was any dishonesty in what was done a year and a half before, and it does not displace the statement that the directors did not intend at the time to take in any more members. If there was any misrepresentation in 1876 it would give a right of action to each individual who took shares against the persons who deceived him, or it might form a ground for getting himself relieved

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from his shares. But on this summons it is the company, not the individuals, which is seeking relief against the directors.

One word as to the cases which have been referred to. The circumstances of this case entirely distinguish it from the *Society of Practical Knowledge* v. *Abbott* (1), for there it was intended from the beginning to offer the shares to the public, and the directors had no right to deceive those whom they intended to bring into the company. I also think the observations of Lord Justice *James* in *In re Ambrose Lake Tin and Copper Mining Company* (2) are not at all inconsistent with our decision.

Solicitors for Appellant: *Ramsden & Austin.*
Solicitors for Respondents: *Benham & Tindell; Butcher.*

M. W.

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C. J. B.
Jan. 17, 24.
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March 24, 31;
April 7.

Post 670
7 QBD 415
15 ChD 205

Ex parte BANNER. *In re* BLYTHE.

Proof in Bankruptcy—Judgment Debt—Power of Court to go behind Judgment.

The Court of Bankruptcy will go behind a judgment or a compromise, and refuse to admit a proof founded upon it, if it can see that the original claim was not a *bonâ fide* one, but was made for purposes of extortion, the claimant knowing that he had no legal claim, but being aware of circumstances affecting the character of the Defendant which would prevent the latter from submitting to a cross-examination.

Per Brett, L.J., *Callisher* v. *Bischoffsheim* (3) questioned.

RICHARD BLYTHE and *Walter Blythe* carried on business as shipowners at *Liverpool* and in *London*, under the firm of *Blythe Brothers.*

S. J. Sheil was employed by them as a clerk or accountant, to make up their books, at a salary of £100 a year.

In February, 1876, a steamer called the *Abdiel*, of which *Blythe Brothers* were part-owners and were the managing owners, was stranded at *St. Thomas.* On the 16th of February they entered into an arrangement with *Sheil* that he should go at once to *St. Thomas* to look after the interests of all the persons who were interested in the ship, and he was to receive for his services a remuneration of £3 3*s.* a day, and to be paid his expenses. He started at once, and arrived there early in the month of March. A firm of *Briscoe, Macdougall, & Co.*, were acting as agents for *Blythe Brothers* at *St. Thomas* in relation to the ship, and were entitled to receive certain commissions for their services. *Sheil* soon after his arrival entered into an agreement with them that they should share their commissions with him, that is, should allow him half of what they received. This agreement he communicated to *Blythe Brothers* in a letter written on the 10th of March. The allowance thus made by *Briscoe & Co.* (known as "returned commissions") was in the first instance entered in the books of *Blythe Brothers* as belonging to them. *Sheil* returned to *England* in May, 1876, and continued in the employment of *Blythe Brothers* as their clerk or accountant. By his authority they received from the agents in *England* of *Briscoe & Co.* payment of the returned commissions.

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(1) 2 Beav. 559.
(2) 14 Ch. D. 390.
(3) Law Rep. 5 Q. B. 449.

In October, 1877, the underwriters who had insured the ship, and had made payments to *Blythe Brothers* in respect of the loss, commenced an action against *Blythe Brothers*, in which they alleged that *Blythe Brothers* had received returned commissions from *Briscoe & Co.* in respect of the ship, and that those commissions ought to have been brought into account in the settlement with the underwriters, and the Plaintiffs claimed a return of part of what they had paid in respect of the loss. The day before the action was commenced the sum which had been received as "returned commissions" was carried to the credit of *Sheil* in a new account which was opened for the purpose in his name in the books of *Blythe Brothers*. This was done with his knowledge, he himself making the entry in the books. In answer to interrogatories put to them by the Plaintiffs in the action, *Blythe Brothers* swore that no deductions or returns out of the commissions allowed by them to *Briscoe & Co.* had been made or paid to them by *Briscoe & Co.* But they said that they believed that *Briscoe & Co.* had allowed *Sheil* a portion of their earnings for assistance which he rendered them. This action was afterwards compromised.

In May, 1880, *Sheil*, who had then left the employment of

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Blythe Brothers, commenced an action against them, in which he claimed the payment of £1042 10*s*. 3*d*. He alleged that *Blythe Brothers* had received that sum from *Briscoe & Co.* for him, and that it was paid by *Briscoe & Co.* in respect of services rendered by him to them. By their statement of defence *Blythe Brothers* said that the amount claimed by the Plaintiff represented "returned commissions" to which the owners of the steamer were entitled. The Defendants admitted that, after the settlement with *Briscoe & Co.*, they had carried the returned commissions to the credit of the Plaintiff in their books, but they said that, as soon as they had arranged certain disputes with the underwriters, the sums in question were transferred in their books to the credit of the owners of the ship. This action was on the list for trial before Lord Justice *Bramwell* at the *Liverpool* Assizes on the 28th of July, 1880, but before the Plaintiff's case was opened the Defendants, on the advice of their counsel, agreed to a compromise, on the terms of their paying the Plaintiff £400 and his taxed costs of the action, and the following Judge's order was made:—"By consent I do order that all further proceedings in this action be stayed upon the following terms: viz., the Defendants to pay to the Plaintiff £400 and taxed costs in full settlement." On the 2nd of August, 1880, *Blythe Brothers* filed a liquidation petition. *Sheil* tendered a proof in the liquidation for £510 8*s*. 8*d*., being the £400 and the taxed costs of the action. The trustee rejected the proof, and the Judge of the *Liverpool* County Court confirmed the rejection. *Sheil* appealed to the Chief Judge. The appeal was heard on the 17th and 24th of January, 1881.

W. R. Kennedy, for the Appellant.

Neville, for the trustee.

BACON, C.J.:—

No doubt the case is extremely complicated, and it turns upon very nice questions. I quite agree that an agent employed to do the best he can for his principal has no right to make a bargain for himself. But if he does, his principal may adopt what he has done.

The relation of principal and agent, so far as relates to this transaction, was, in my opinion, entirely overridden by the way in which the account was afterwards dealt with.

There came a demand on the part of *Blythe Brothers*, that the account should be modified, and that the money should no longer stand to the credit of *Sheil*. This was not acceded to by him; so far from it, he brought an action against them for the recovery of a large sum of money, and the parties joined issue in that action.

That brings me to the consideration of the arrangement which was then made. What was that so far as it appears? The parties being in Court, counsel being instructed, *Sheil* relying upon what he said to be his rights, and the *Blythes* being there to defend the claim which *Sheil* had made against them, by the advice of the *Blythes*' counsel an arrangement is come to by which a consent to a judgment for £400 and costs is given. The *Blythes*' account of it is that, upon hearing from their counsel the disadvantages which might attend a further discussion of these transactions, and being advised that on that account it was better to consent to a judgment for £400 and costs (issue being joined, the parties being ready to fight the matter out, and to submit to a jury and to the Court the questions which were at issue between them), this compromise was come to. Mr. *Neville* has argued that which I cannot think is open to the slightest question, that a judgment recovered against a bankrupt either by fraud or by mistake (and want of consideration would only be one branch of fraud) is one from which the trustee in the bankruptcy may be relieved. I do not dispute that in the slightest degree. But here the consideration was the forbearance for all this time, the entries in the books, and the non-disclosure of the circumstances which related to them. Could *Blythe Brothers* have been relieved against the compromise themselves? The trustee has no better right than they would have had. He cannot bring into question a judgment which is not founded either upon fraud, or misadvertence, or accident, or mistake, want of consideration being a branch of fraud. He does not shew any such ground. The matter came before the County Court, and there, on the grounds which have been argued very ably to-day by Mr. *Neville*, the learned Judge came to the conclusion that there never was any right of action.

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Can I under these circumstances say that there never was any right of action? I have not the means of knowing what might have been the verdict returned by the jury. I know the parties were there at arm's length, ready to fight, and that the Defendants in the suit thought it worth their while to consent to a verdict or judgment for £400 and costs. I think that for the sum for which judgment was confessed on that occasion the present Appellant had a right to prove, and that the order which rejected his proof cannot be sustained.

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From this decision the trustee appealed. The appeal was heard on the 24th and 31st of March and the 7th of April, 1881.

Bompas, Q.C., and *Neville*, for the Appellant:—

These returned commissions really belonged to the owners of the ship; *Sheil* had no right to them, and in the first instance he did not treat them as his, and had no intention of claiming them. He claimed them for his principals, and informed them that he had done so. At any rate, he was clearly bound to account to them for the money. In the Court of Bankruptcy a judgment is not conclusive of the validity of the debt recovered. In the bankruptcy of the judgment debtor the Court will go behind the judgment and will inquire into the consideration for the debt. If it sees that there was no consideration it will refuse to admit a proof for the debt: *Ex parte Kibble* (1); *Ex parte Bryant* (2).

[JAMES, L.J.:—A judgment is always conclusive when there has been a real fight between the parties. The object of the bankruptcy rule was to prevent a man from confessing judgments in favour of his friends just before his bankruptcy.]

The claim in the action was fraudulent on the part of *Sheil*.

[BRETT, L.J.:—The *Blythes* may have had a good defence to the action, but in order to raise it they would have had to go into the box at the expense of their character in the face of all their friends in *Liverpool*. Therefore they were advised to consent to a judgment against them. There was no fraud as between the parties to the action.]

(1) Law Rep. 10 Ch. 373.

(2) 1 V. & B. 211, 214.

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The trustee in the bankruptcy has a higher right than the bankrupts would have had. When they assented to the compromise they were in fact dealing with their creditors' money, not with their own. *Sheil* was making use of the fact that the money had been carried to his credit for a particular purpose in order to extort money from the *Blythes.* If the money had been actually paid to him it may be that he could not have been compelled to refund it, but as he is obliged to prove for it in the bankruptcy, he must submit to the rule of the Court of Bankruptcy, that the claim must be a real and honest one. There was no debt and no compromise of a *bonâ fide* claim. It was a distinctly fraudulent claim. In order that there should be a consideration to support a compromise of a claim, the claim must be one which the person against whom it is made knows to be a reasonable one. In this case the Defendants knew that the money really belonged to the insurers of the ship whom they had been trying to defraud.

Winslow, Q.C., and *W. R. Kennedy*, for *Sheil*:—

As regards most of the transactions of a bankrupt, the trustee stands in exactly the same position as the bankrupt himself; with regard to some transactions the trustee stands in a better position than the bankrupt by virtue of the bankruptcy law. In order that this compromise should be invalid as against the trustee, it must be brought within sect. 92 of the Act. The principles by which the Court of Bankruptcy is guided in inquiring into the consideration for judgments is shewn by *Ex parte Prescott* (1); *Ex parte Mudie* (2). The circumstances must be such as would have induced a Court of Equity to restrain execution on the judgment. *Ex parte Kibble* (3) is not contrary to this. But in the present case the evidence shews that there was good consideration for the debt. At any rate, there was a fair case to go to the jury in the action, and the compromise cannot now be set aside. There is nothing to connect *Sheil* with any attempt to cheat the underwriters. He was making what he, at any rate, believed to be a fair claim. If so, the compromise is good, and the Court will not go behind it merely because it thinks that he would not

(1) 1 M. D. & D. 199.
(2) 3 M. D. & D. 66.
(3) Law Rep. 10 Ch. 373.

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have succeeded in the action. The question is whether there was good consideration for the compromise. In *Cook* v. *Wright* (1) it was held that there was good consideration for a compromise, though the defendant was not really liable at all.

[JAMES, L.J.:—There was a *bonâ fide* belief by the plaintiffs that he was liable.]

Sheil bonâ fide believed he was entitled to what he claimed. The present case is stronger than *Cook* v. *Wright.* The effect of a compromise is to alter the position of the parties. If *Sheil* had attempted to prove in the liquidation for the whole sum which he had sued for in the action, the compromise would have been an answer to his claim. The Court of Bankruptcy has never gone behind a compromise, whether made by a deed or by a judgment.

[BRETT, L.J.:—Must there not be a *bonâ fide* belief that the the claim is doubtful?]

That is not necessary. Forbearance to sue is a good consideration to support a compromise: *Callisher* v. *Bischoffsheim* (2); *Ockford* v. *Barelli* (3); *Ex parte Mumford* (4).

It cannot be assumed that a man who deliberately brings an action has not a *bonâ fide* belief of success. *Ex parte Bryant* (5) was a peculiar case. There is no authority for going behind a compromise unless there has been fraud or collusion by both parties. Before *Ex parte Kibble* (6) it was never distinctly said that the Court would go behind any judgment except one obtained by default; and Lord Justice *Knight Bruce*, in *Ex parte Mudie* (7), evidently doubted whether it could be done then unless there had been collusion. If there is a *bonâ fide* claim, it is immateria what are the motives of the person who accepts a compromise. *Primâ facie,* where there is a compromise, there is some consideration for it. It is not a question of adequacy. When a fraudulent preference is alleged, if there was a mixed motive, the trustee in bankruptcy cannot avoid it.

[They also referred to *Haigh* v. *Brooks* (8).]

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(1) 1 B. & S. 559.

(2) Law Rep. 5 Q. B. 449, 451.

(3) 20 W. R. 116.

(4) 1 Mont. & Ayr. Bankrupt Law, 2nd Ed. p. 203, n.

(5) 1 V. & B. 211, 214.

(6) Law Rep. 10 Ch. 373.

(7) 3 M. D. & D. 72.

(8) 10 A. & E. 309.

JAMES, L.J., after stating the facts as to *Sheil* being sent out to *St. Thomas*, and his discovery that *Briscoe, Macdougall, & Co.*, were entitled to receive commissions in respect of their services to the ship, continued:—

Finding that out the day after his arrival there he made a claim for "returned commissions," that is, for a share of the commissions which *Briscoe, Macdougall, & Co.* were to receive. The question is for whom he made this claim. That he made it for himself on account of any special services he was to render to *Briscoe, Macdougall, & Co.*, is to my mind absolutely incredible. He was claiming the share which one agent frequently gets from another in commission, or something in the nature of commission, not an uncommon thing—perhaps more common than honest—in matters of this kind. He, the servant of his masters, on their behalf claimed these returned commissions. *Briscoe, Macdougall, & Co.* acceded to the demand, whereupon *Sheil* gave notice immediately to his principals in a letter in which he referred to their chance of getting something of a similar character from similar agents in *England*.

Then it seems to have struck *Sheil's* principals that, if the thing was entered in their books according to the real truth of the case, if it was dealt with according to the honesty of the transaction, the moneys would probably be claimed by the underwriters, or, if they could not make out a claim, they might be claimed on behalf of the co-owners of the ship, because it is manifest that, in the position in which *Blythe Brothers* then stood, they could not have honestly made that bargain with *Briscoe, Macdougall, & Co.* for their own profit, they being agents on behalf of the ship, and to some extent also agents to do the best they could for the underwriters, and to diminish the loss which the underwriters would have to make good. Therefore, in order to conceal the transaction, the name of *Sheil* was used, with his consent and with his knowledge, for the purpose of cheating other persons. That is the plain truth, expressed in simple English language; the account was entered and the bargain was made in the name of *Sheil* in order that a fraud might be committed upon the underwriters, or, if not upon them, upon the co-owners. Then the money was received by *Blythe Brothers*, and *Sheil*, knowing in what a position they had put themselves, knowing how, in order to carry into effect this scheme, the accounts had been made out and statements made representing him as the real owner of the money, when he knew perfectly well that he had no more right to any part of the money than anybody else in the world, that he was only seeking to obtain a share of that which was in truth plunder intended to be made at the expense of other persons, brought his action. He brought his action, based on the fact that his name had been used as the real owner of the money, and under the circumstances the men who had employed him, or had used him as a tool for the purpose of committing the fraud, were not in a position effectually to resist his claim by going into the witness box, and by reason of the pressure thus put upon them they were driven to submit to an order for a small sum given by way of compromise. They have become bankrupts, and their other creditors, who no doubt include the very persons upon whom this fraud was committed, say that the compromise ought not to stand, that it cannot be the foundation of a good debt in bankruptcy. I am of opinion that it would be a shocking violation of justice, truth, and honesty if we were to allow a claim, originating in the circumstances which I have mentioned, based upon a compromise entered into in the manner I have described, to prevail in competition with the honest creditors of the bankrupts. I am of opinion that the judgment of the County Court is right, and that the Chief Judge's judgment ought to be reversed.

BRETT, L.J.:—

The question is whether *Sheil* ought to have been allowed to prove an alleged debt against the estate of *Blythe Brothers* in their bankruptcy. On his behalf it is said that he ought to be allowed to prove, because his proof as proposed was upon a judgment which he had obtained against *Blythe Brothers*, and it is said that the Court cannot go behind the judgment and see what was the state of things before it. On the other hand, it is alleged that, under the circumstances of the case, the Court sitting in the bankruptcy is entitled to look behind the judgment, and that, if it looks at the transactions which occurred before the judgment, it will see that there never was any debt at all due from the bankrupts to

Sheil, and that the judgment was obtained, not upon a fair compromise of a dispute, but dishonestly, by dishonest means known to both the parties. [His Lordship reviewed the facts of the case, and continued:—] It seems to me that *Sheil* knew perfectly well that he had no claim against *Blythe Brothers* for this money, but he had helped them to put themselves into a most disreputable position. Then he brought an action against them, and, to my mind, clearly with this view and upon this ground, not because he thought he had a good cause of action—he had no doubt that as against *Blythe Brothers* he had no cause of action, and that they owed him nothing—but he foresaw that they would be in a most fearful position if they resisted his claim and went into the box as witnesses. The action was brought, not to recover on a *bonâ fide* cause of action, but was used, as many actions are, as an instrument of oppression in order to extort money from the Defendants. Then the case went into Court, and the Defendants' counsel, one of the most honourable men at the Bar, was bound to give his client his advice. We do not know what he actually said, but it is obvious that he must have said, "If you go into the box with the defence which you are now setting up, your character in the face of all the persons who know you in *Liverpool* as a man of business will be gone, because, if you swear what you must swear to resist the Plaintiff's claim, it necessarily follows either that you will be perjured in this action or that you were perjured in the other. Therefore I advise you to yield." Well, that advice was inevitable. *Sheil* and *Blythe Brothers* both knew the circumstances, and therefore the action had the effect which from the beginning it was intended to have as between the parties, though this was not known to their legal advisers. The action, which was brought for extortion, ended in a judgment which was the result of extortion.

Now the question is, can we go behind that judgment? In my opinion we can, and it would be monstrous if we could not. It is a judgment or a compromise obtained by dishonesty known to both the parties to it.

But then two cases were cited. Reliance is placed on *Callisher* v. *Bischoffsheim* (1), in which Lord Chief Justice *Cockburn* said (2):

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(1) Law Rep. 5 Q. B. 449.

(2) Law Rep. 5 Q. B. 451.

"The authorities clearly establish that if an agreement is made to compromise a disputed claim, forbearance to sue in respect of that claim is a good consideration." But in a subsequent part of his judgment he said (1): "When such a person forbears to sue he gives up what he believes to be a right of action." Therefore it is not enough that the action is brought to settle a disputed claim; it must be a claim by a person who believes he has a right of action. But in the present case, I say that, although Mr. *Sheil* believed he would win the cause, he never did believe that he had a right of action; he knew that he had none. Therefore, even if that, which was not a case in bankruptcy, could apply to a case in bankruptcy, it does not govern the present case.

But, whenever a similar case arises, I think it will have to be carefully considered whether the decision in *Callisher* v. *Bischoffsheim* (2) can be supported, and whether, in order to support a compromise of an action, it is not necessary to shew, not only that the plaintiff believed that he had a good cause of action, but that the circumstances did in fact raise some doubt whether there was or was not a good cause of action, and I venture to doubt whether, if there was clearly and obviously no cause of action, the mere belief of the parties that there was would support the compromise. It is true that the subsequent case of *Ockford* v. *Barelli* (3) (if that be also held to be good law) is an authority against this view, because in it there could not possibly be a doubt that there was no cause of action. But I take it that *Ockford* v. *Barelli* was decided upon the authority of *Callisher* v. *Bischoffsheim*, adopting the view that the passage which I have read from the earlier part of the judgment of Lord Chief Justice *Cockburn* was the ground of the decision. Of course, if it were so taken, the Court in the later case, being a Court of co-ordinate jurisdiction, was bound by the decision in the earlier case; but then, if the first case falls, the second would fall with it. However, neither case seems to me to be very material in the present case, for neither of them was a case in bankruptcy. In my view the judgment in the present case was a dishonest judgment, obtained by dishonest pressure, not because there was any doubt about the cause of action, not

(1) Law Rep. 5 Q. B. 452.

(2) Law Rep. 5 Q. B. 449.

(3) 20 W. R. 116.

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even because either party believed that there was any doubt about the cause of action, but, both parties knowing that there was no real cause of action, the one endeavoured to oppress the other by reason of that other's infamy known to him, and the other yielded, not because he believed there was, or doubted whether there was, a cause of action, but because he did not dare to face the consequences of his own infamy.

Under these circumstances it seems to me that to allow the other creditors to be ousted of their rights by such a judgment would be a monstrous conclusion, and one not warranted by the law. And, if we do go behind the judgment, it seems to me that there is not and never was any colour or pretence for saying that there was any debt due from *Blythe Brothers* to *Sheil.* In the beginning this arrangement for returned commissions was made by *Sheil* on behalf of *Blythe Brothers,* and not on his own behalf at all. But I go further, and say that, even if it had been made by *Sheil* on his own behalf, he could not have retained the money, but it would nevertheless have belonged to *Blythe Brothers.*

Therefore, from beginning to end, there never was any pretence for saying that any part of this money was due from *Blythe Brothers* to *Sheil.*

COTTON, L.J.:—

Sheil has been admitted to prove for the amount for which he obtained the Judge's order. I will assume that order to have as strong an effect as a judgment, but it was in fact obtained by an arrangement or compromise between the parties to the action. The first question of course is whether we can go behind that order and inquire whether, independently of it, there was in fact any good claim by *Sheil* against the bankrupt.

I shall not enter into the question whether, if *Blythe Brothers* had not become bankrupts, they would have been bound by the compromise, that is not necessary, because it must be conceded, and it is well established, that in bankruptcy the trustee, as representing the creditors, is entitled to go behind a judgment, under circumstances in which the person against whom it was obtained would not be allowed to do so, or to dispute his liability for the amount of the judgment. Neither do I think it necessary to give an opinion on the point which I threw out during the argument, whether, supposing that *Sheil* had been *bonâ fide* prosecuting his action, and the Defendants had entered into the arrangement, not with reference to the probability of his success in the action, or to the validity of his claim, but for an entirely collateral purpose, namely, to prevent losing their character, or possibly being prosecuted for perjury, if they defended the action, the arrangement could, as against the creditors in the bankruptcy, have been allowed to stand, because, in my opinion, it cannot be said that *Sheil* acted *bonâ fide* in bringing the action. I will explain what I mean by *bonâ fide*. In my opinion, in judging of his *bona fides*, the question is, not whether he thought he would succeed in the action—very probably he did in consequence of the hold which his knowledge of the Defendants' conduct had given him over them—but whether he really believed that he had a right to claim the money as his. Of course, for the purpose of considering that question, we must see what were the circumstances under which the money was received by *Blythe Brothers*, and we must at the same time consider whether he had any claim to it.

[His Lordship referred to the correspondence, to the mode in which the accounts were made out, and to the fact that, the day before the action by the underwriters was commenced, the money was carried to a new account opened in *Sheil's* name, and continued:—]

In my opinion there is enough to shew that this was not the money of *Sheil*, that he knew it was not his money, and that the entries in the books of *Blythe Brothers* were made, not as admitting that he had a just right to the money, but for another purpose. Then came his action against *Blythe Brothers*. They had sworn in the underwriters' action that this was his money, and there was his opportunity. They could not resist the claim in his action without admitting that they had sworn falsely in the former action, and without swearing exactly in contradiction to what they had formerly sworn. So that he might well have believed, having that hold upon them, that he would succeed in his action, though he knew, as the fact was, that he had no possible right to the money which he was claiming.

In my opinion, therefore, it is not the case of a plaintiff *bonâ*

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fide believing he had a right to the money he claimed, it is not a compromise in which the Plaintiff was acting *bonâ fide;* but both parties knew that *Sheil* had no right to the money, and there was a probability of success in the action, simply in consequence of the Plaintiff and the Defendants having been parties to a fraud on third persons. In my opinion it would be positively wrong to allow an order obtained under such circumstances to stand as against the creditors of the bankrupts. In my opinion we ought to go behind the order so obtained and to investigate the claim, and upon an investigation of the claim I have no hesitation in saying that *Sheil* has no right to the money, and cannot be allowed to prove.

Neville said he desired to state that, before any pressure had been put by *Sheil* on the *Blythes,* they had ordered the amount of the returned commissions to be transferred in their books to the account of the ship.

Solicitors for Trustee: *Robinson & Cameron,* agents for *Gill & Archer, Liverpool.*

Solicitors for *Sheil: Layton & Jaques,* agents for *C. C. Deane, Liverpool.*

W. L. C.

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Railway Company—Arbitration—Reference to Railway Commissioners—Regulation of Railways Act, 1873 (36 *&* 37 *Vict.* c. 48), s. 8—*Injunction—Prohibition.*

Two railway companies were empowered by a special Act to enter into a working agreement, but no provision was made respecting arbitration. The agreement made under this Act contained a clause providing that any difference between the companies should be determined by arbitration, in accordance with the provisions of the *Railway Arbitration Act,* 1859. Differences having arisen, one of the companies called upon the Railway Commissioners to decide the differences under the 8th section of the *Regulation of Railways Act,* 1873.

The other company accordingly issued a writ for an injunction against

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the first company, which was amended by making the Railway Commissioners parties, and asking for a prohibition :—

Held (reversing the decision of *Jessel*, M.R.), that the Railway Commissioners had no jurisdiction to undertake the arbitration, and a prohibition was issued accordingly.

The clause in the 8th section of the *Regulation of Railways Act*, 1873, which enables one party to apply for the arbitration of the Railway Commissioners, "where any difference between railway companies is, under the provisions of any general or special Act, required or authorized to be referred to arbitration," does not apply to all cases in which the agreement under which the difference has arisen has been made under the provisions of a general or special Act, but only to cases in which the specific difference has been required or authorized by a general or special Act to be referred to arbitration.

Stokes Bay Railway and Pier Company v. *London and South Western Railway Company* (1) and *Portpatrick Railway Company* v. *Caledonian Railway Company* (2) disapproved.

THE *Great Western Railway Company* are the owners of lines of railway from *London* and other places to *New Milford*, and are the owners of steamers plying between *New Milford* and *Waterford*, in *Ireland*.

The *Waterford and Limerick Railway Company* are owners of a line from *Waterford* to *Limerick* and other places in *Ireland*. By the *Waterford and Limerick Railway Arrangement Act*, 1866 (29 & 30 Vict. c. cclxxii.), it was, among other things, provided, that the *Waterford and Limerick Company*, on the one hand, and the *Great Western Railway Company*, on the other hand, might from time to time enter into agreements, contracts, or arrangements with respect to the following purposes, or any of them (that is to say), the interchange, accommodation, conveyance, &c., of traffic coming from or destined for the undertakings of the contracting companies, and the fixing, apportionment, and division between the companies of the receipts arising from such traffic.

Nothing was said in the Act respecting arbitration in case of disputes arising between the companies.

In accordance with this Act a working agreement was entered into between the two companies on the 18th of April, 1872, respecting the traffic over the two lines, and by the *Great Western Company's* steamers.

The 40th article of this agreement provided that if any difference should arise between the two companies respecting any of the matters comprised in the agreement, every such difference should, except as therein otherwise provided, be referred to and determined by arbitration, in accordance with the provisions of the *Railway Companies Arbitration Act*, 1859, and that this article should accordingly be and have the effect of an agreement between the two companies for, and a reference to, arbitration, under that Act.

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(1) 2 Nev. & Mac. 143.

(2) 3 Nev. & Mac. 189.

The 41st article provided that a person from time to time appointed by the respective chairmen of the *Great Western* and *Waterford* companies by writing under their hands, and failing their agreement thereon, a competent and impartial person to be, on the application of the companies, or either of them, named in that behalf by the Board of Trade should be the single arbitrator for the purposes of the agreement.

Differences having arisen between the two companies with respect to certain matters comprised in their agreement, the *Waterford and Limerick Company*, on the 22nd of January, 1881, applied to the Railway Commissioners under the 8th section of the *Regulation of Railways Act*, 1873, to decide the differences between them (1); and the Commissioners thereupon made an order under that section referring the matter to themselves, in accordance, it was said, with their usual practice, pursuant to the General Orders under that Act.

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(1) 36 & 37 Vict. c. 48, s. 8:— "Where any difference between railway companies, or between canal companies, or between a railway company and a canal company, is, under the provisions of any general or special Act, passed either before or after the passing of this Act, required or authorized to be referred to arbitration, such difference shall at the instance of any company party to the difference, and with the consent of the Commissioners, be referred to the Commissioners for their decision in lieu of being referred to arbitration; provided that the power of compelling a reference to the Commissioners in this section contained shall not apply to any case in which any arbitrator has in any general or special Act been designated by his name or by the name of his office, or in which, a standing arbitrator having been appointed under any general or special Act, the Commissioners are of opinion that the difference in question may more conveniently be referred to him."

Sect. 9. "Any difference to which a railway company or canal company is a party may, on the application of the parties to the difference, and with the assent of the Commissioners, be referred to them for their decision."

On the 2nd of February, 1881, the *Great Western Company* issued a writ against the *Waterford Company* for an injunction to restrain them from proceeding before the Railway Commissioners in breach of the agreement of the 18th of April, 1872, and on the 14th of February they moved for an injunction in terms of the writ.

The Master of the Rolls was of opinion that the matter could not be decided in the absence of the Railway Commissioners, and made an order that the writ should be amended by adding the Railway Commissioners as Defendants, and asking thereby for prohibition against them, and he gave the Plaintiffs a rule calling on the Defendants to shew cause why a writ of prohibition should not issue against them.

On the 18th of February the Defendants shewed cause against the rule for a writ of prohibition.

Sir *H. James*, A.G., and *Rigby*, for the Railway Commissioners, contended that they had jurisdiction to entertain the matter.

Davey, Q.C., and *R. S. Wright*, for the Plaintiff company, *contrà*.

Chitty, Q.C., and *Pembroke Stephens*, for the Defendant company.

In the course of the arguments on the present and former occasion, the following Acts of Parliament were referred to:—The *Railways Regulation Act*, 1840 (3 & 4 Vict. c. 97), ss. 18, 19; the *Railways Regulation Act*, 1842 (5 & 6 Vict. c. 55), s. 11; the *Railways Clauses Consolidation Act*, 1845 (8 Vict. c. 20), ss. 115, 117; the *Railway Companies Arbitration Act*, 1859 (22 & 23 Vict. c. 59), s. 2; the *Railways Clauses Act*, 1863 (26 & 27 Vict. c. 92), s. 9; the *Regulation of Railways Act*, 1873 (36 & 37 Vict. c. 48), ss. 8. 9, 10; the *Board of Trade Arbitrations, &c., Act*, 1874 (37 & 38 Vict. c. 40), s. 6; the *Regulation of Railways Acts*, 1873 and 1874, *Continuance Act*, 1879 (42 & 43 Vict. c. 56).

The following cases were also referred to: *Stokes Bay Railway and Pier Company* v. *London and South Western Railway Company* (1) and *Portpatrick Railway Company* v. *Caledonian Railway*

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(1) 2 Nev. & Mac. 143.

Company (1), both before the Railway Commissioners; and *Hedley* v. *Bates* (2).

JESSEL, M.R. :—

This case affords a strong illustration of the difficulty of dealing with questions of construction of Acts of Parliament.

It is fairly admitted by the Attorney-General that a good deal of the 8th section of the *Regulation of Railways Act*, 1873, is utterly useless, and has no particular meaning if I decide in accordance with his arguments; and, on the other hand, it cannot be denied on the part of the Plaintiffs that there is a good deal of inconsistency in the language of the section, having regard to the actual course of legislation, if I decide according to their view. It is really very difficult to know what the meaning of the section is.

I must also consider this, which is a very important point, that this is a motion for a prohibition made before a single Judge. It is, in fact, asking me to overrule two reported decisions of the Railway Commissioners, and a long course of practice which they have adopted and which has been hitherto unquestioned; and it would be a very strong measure on the part of a single Judge to do that, unless he were clearly convinced that the Railway Commissioners were wrong. I say "clearly convinced," because, if I were to entertain a clear and strong opinion on the proper construction of this provision in the Act of Parliament, and if that clear and strong opinion were that the construction contended for on behalf of the Plaintiffs were correct, I should not hesitate to follow that opinion, as it would be my duty to do, leaving it to be corrected by the Court of Appeal if it were erroneous. But I have not that clear and strong opinion. I am not convinced that the construction which has been adopted by the Commissioners is not the one intended by the Legislature, and the construction fairly within the purview of the language used. We must consider what the language is. The section in question says, "Where any difference between railway companies . . . . is, under the provisions of any general or special Act . . . . required or authorized to be referred to arbitration." Now I am told that there is no instance of a specific difference between any two such companies

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(1) 3 Nev. & Mac. 189.

(2) 13 Ch. D. 498.

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having been referred to the arbitration of a named or designated arbitrator by any general Act; and I am willing to accept that assertion, because if there had been any such case it would, no doubt, have been produced before me: though one cannot help thinking that the Legislature must be taken to have known what the course of its own legislation had been, and can hardly be presumed to have passed a section referring to something which did not exist, or containing words having no particular or special meaning.

The first question which I have to consider is, what is the literal meaning of the words? The literal meaning of the words is, "Any difference under the provisions of a general or special Act required or authorized to be referred to arbitration;" and it is clear from the terms of the *Railway Companies Arbitration Act*, 1859 (s. 2), that any possible difference between, at all events, two or more railway companies may be referred to arbitration; and consequently, as far as the railway companies are concerned (I do not know whether there is any similar Act as regards canal companies), there is some sense in supposing that the general Act applies to all of them. Therefore we have this, that there are provisions of a general character referring to railway companies at all events; though there may be some general provisions applying also to canal companies, or to a railway company and a canal company; and there may be special Acts applying to canal companies *inter se*, or to railway companies and canal companies, although no general Acts. However that may be, the words of the 8th section are not entirely vague and useless: they may be superabundant, and they may not be required; the effect may be the same as if they had been left out; but still, reading the word "difference" to mean a difference referred in general Acts to arbitration, and, as a rule, there not being any special difference whatever referred in any general Act, I think the literal meaning is any difference properly so called. I have been referred to one or two railway cases under the general Acts, but I do not think those are cases with reference to arbitration; they rather seem to be cases involving questions which are properly described by the 6th section of the *Board of Trade Arbitrations, &c., Act*, 1864, as questions to be determined or settled by the Board of Trade, as distinguished from questions referred to the arbitration of the Board of Trade. Different rules apply to the action of the Board of Trade in the two cases.

Then it is said, and said very fairly, "If that is the meaning of the section, the proviso at the end is very singular." Well, it is admitted this section is exceedingly difficult to make anything of at all. The section says it "shall not apply to any case in which any arbitrator has in any general or special Act been designated by his name or by the name of his office, or in which, a standing arbitrator having been appointed under any general or special Act, the Commissioners are of opinion that the difference in question may be more conveniently referred to him." The first observation I would make is this: I do not pretend to know the contents of every general Act of Parliament, and I do not think any Judge can be expected to do so. I have always said that I can only know those Acts to which I am referred. With that limitation I will say that there is no general Act of Parliament in which an arbitrator is designated by his name, or in which a standing arbitrator is appointed; or, as far as I can see (that is the meaning I put on the cases referred to before me), where he is designated even by the name of his office. It is very singular, if there is no such thing to be found in any general or special Act, that we have the words "has in any general or special Act"; but the answer is that, although those words apply in fact only to special Acts, the Legislature has put them in *ex abundanti cautelâ*, to provide for the accident that there may be some such general Act, although not known to the Legislature; and possibly some such general Act may exist, although not known to me or to any of the counsel in this case. The words are put in to provide for the accident, and not with any view of limiting the purview of the section. It is said again—and the argument has considerable force—"What a singular result it is, that although the Commissioners may be of opinion that the question may be more conveniently disposed of by the arbitrator if he is named in a particular agreement between the companies they cannot leave it to him, although they can do so if he is named in an Act of Parliament." It is very singular. I do not think the answer made that the Commissioners are not to take any reference without their consent is a complete answer, because we are then met by the difficulty that that applies to every case, and if so, the proviso at the end of the section is not wanted. The meaning of the section appears to me to be this, that the Legislature, adopting the rule of abundant caution, has pointed out one ground on which the Commissioners may refuse: it does not mean that they may not consider other grounds, but that this particular ground is to be treated as sufficient. Of course in a case where an arbitrator has been agreed upon they are in this position, that they are at liberty to say, " We will not consent to take this arbitration, because you have a better arbitrator already agreed upon." There is this also to be considered, that the Legislature, by the 10th section of this Act of Parliament, gives certain powers to the Railway Commissioners which were formerly possessed by the Board of Trade; and then an Act passed in the next year—the *Board of Trade Arbitration, &c., Act,* 1874—gave, as I read it, the Board of Trade power to decline to accept arbitrations. No doubt, the words of the 6th section of that Act are, "under the provisions of any general or special Act," but they are wider than those of the Act of 1873. The case is now not that of a difference merely between railway companies and canal companies, but the words are, "Where any difference to which a railway company or canal company is a party is required or authorized under the provisions of any general or special Act passed either before or after the passing of this Act, to be referred to the arbitration of or to be determined or settled by the Board of Trade, or some person or persons appointed by the Board of Trade." There the Board of Trade has a power of declining the arbitration and of sending it over to the Railway Commissioners and appointing them the arbitrators. If the section were to be limited in the way proposed it would have this singular result, that where the Board of Trade is required by a public or special Act of Parliament—that is, required by the Legislature—to undertake the duty of an arbitrator, they are at liberty to send the case to the Railway Commissioners; but where they are required to undertake the arbitration only by the consent of the parties, that is, where they are not obliged to undertake it, they cannot send it over to the Railway Commissioners. In other words, there would be this singular result, that where the Board of Trade has to name an arbitrator it may name anybody but the Railway Commissioners. I do not think that it is a fair construction of the section, and, being a section in a statute in *pari materiâ* with the statute of 1873, it seems to me I may fairly call it in aid. Without saying that I am quite confident that the opinion at which I have arrived is correct, I will say this, that, fortified as I am by the opinion of the Railway Commissioners as to the reading of the section, I ought to decide that their reading of it is the proper reading, and therefore I refuse this motion.

C. A.

From this judgment the Plaintiffs appealed. The appeal came on to be heard on the 5th of April, 1881.

Davey, Q.C., and *Webster*, Q.C. (*R. S. Wright* with them), for the Appellants:—

Our right to a prohibition turns on the construction of the 8th section of the 36 & 37 Vict. c. 48, which is in similar terms to the 6th section of the *Board of Trade Arbitration Act* (37 & 38 Vict. c. 40). The fair interpretation of the clause is, that not only the agreement under which the difference arises must have been authorized, but that the specific difference must have been authorized to be referred to arbitration by a general or special Act of Parliament. In all such cases the Railway Commissioners may be appealed to. Where the Legislature had originally created the power of reference to arbitration, there the Legislature steps in to substitute the Railway Commissioners; but where two companies have made a bargain between themselves that in case of difference the difference should be decided in a particular way, the Legislature does not interfere. It would be most unreasonable if it did; for the special mode of arbitration may have been one of the inducements to one or other of the parties to enter into the agreement. According to the Respondents' construction of the clause, the words confining the operation of the clause to cases where the differences were required or authorized to be referred to arbitration were useless; because by the *Railway Companies Arbitration Act*, 1859, every possible difference between railway companies may be referred to arbitration. The clause must have some qualification, and the construction we put upon it is the only reasonable one. There are several instances in which general Acts have appointed special methods of arbitration; for instance, the *Railways Clauses Act,* 1845, ss. 115, 117, the *Railways Regulation Act* (5 & 6 Vict. c. 55), s. 11, the *Telegraph Act,* 1878 (41 & 42 Vict. c. 76), s. 4. In special Acts the instances are very numerous. If the 8th section is to be taken in so wide a sense as to include all differences between railway companies, the 9th section is unnecessary.

We also appeal against the decision of the Master of the Rolls refusing our motion for an injunction. The Defendants are proceeding in breach of their contract, and the Court has power to restrain them by injunction: *Malmesbury Railway Company* v. *Budd* (1); *Beddow* v. *Beddow* (2).

Rigby (Sir *H. James,* A.G., with him), for the Railway Commissioners; and

Chitty, Q.C., and *Pembroke Stephens* (*N. J. Synnott* with them), for the *Limerick and Waterford Railway Company:*—

The question now before the Court has been raised on two former occasions before the Railway Commissioners, and they decided that they had jurisdiction to entertain the arbitration: *Stokes Bay Railway and Pier Company* v. *London and South Western Railway Company* (3); *Portpatrick Railway Company* v. *Caledonian Railway Company* (4); and their jurisdiction has been admitted in a long course of practice. All differences which railway and canal companies are capable of submitting to arbitration, except those specially excepted, are included in the clause: because all arbitrations of matters in difference between railway companies must take place either under the powers of some special Act or under the *Railway Arbitration Act.* The words referring to special and general Acts are not mere surplusage; they were necessary to prevent the question arising whether any special enactments were or were not superseded by the clause. The object of the clause

(1) 2 Ch. D. 113.
(2) 9 Ch. D. 89.
(3) 2 Nev. & Mac. 143.
(4) 3 Nev. & Mac. 189.

was to override all special and general Acts and all agreements so far that if one party wished to go to the Commissioners he would have a right to do so. In the present case the agreement between the companies was made under the powers of their special Acts and of the *Railway Arbitration Act.* It is not necessary that the special Acts of the railway should contain express arbitration clauses, if the agreement containing the power of reference is made under statutory powers. The proviso in the last clause of the section shews that the section is intended to have a wider interpretation.

JAMES, L.J.:—

We need not trouble you about the question of injunction.

With regard to the question of prohibition, I have listened with the greatest possible care and attention to the judgment of the Master of the Rolls, and to the arguments which have been addressed to us at great, but not inordinate length, having regard to the difficulties of the case with which the counsel have had to struggle.

I must say I cannot bring my mind to entertain anything like a shadow of a doubt about this case. The words of the section seem to me to be as reasonably plain as it is possible for a section of an Act of Parliament, as Acts of Parliament nowadays are, to be. We are asked to alter what seems to me to be the very plain and clear meaning of an Act of Parliament for the purpose of doing something which we should be very slow to do, and which it is not usual for the Legislature to do, that is, preventing people from entering into agreements between themselves with regard to their own interests, or for the purpose of destroying the agreements which they have thought fit to enter into.

It appears to me that the 8th section is really very plain. It says that where any difference between railway companies is, under the provisions of any general or special Act, required or authorized to be referred to arbitration, such difference shall, at the instance of any company party to the difference, be referred to the Railway Commissioners for their decision, instead of being referred to arbitration. The plain meaning of that seems to me to be that the clause shall apply where there is a special statutory provision by which a reference to arbitration is substituted for a reference to the ordinary tribunals—either with reference to any particular difference, or with respect to any differences arising under the particular Act of Parliament. First of all, the difference may be one which the Legislature has itself provided shall be referred to somebody as an expert to decide—for instance, such as the working arrangements, the arrangements for joining one railway with another, which are things not fit for an ordinary Court of Justice to deal with; in such a case as that there often is a provision in an Act of Parliament that it shall be referred to some particular individual, or to a person to be named in a particular way. Then the other case is where, under the provisions of the Act of Parliament, either of the parties has a right to compel the other to go to arbitration. It seems to me to apply to a case where there is a compulsory arbitration imposed on the parties by a statutory provision, and it does not extend in words, certainly not in spirit or meaning, to an agreement between companies by which they choose between themselves to provide for a particular mode of reference. The construction contended for by the Respondents leaves out all the words "under the provisions of any general or special Act," and resolves itself into this, "where any difference shall arise between two railway companies," without any limitation whatever. It is said that the proviso at the end of the 8th section tends to shew that is the general provision of the first part of the section. The proviso is that a power of compelling a reference to the Commissioners shall not apply to any case in which any arbitrator has, under general or special Act, been designated, or in which a standing arbitrator has been appointed under a general or special Act. If the section were intended to have the general effect which is contended for on the part of the Respondents, beyond all question that proviso would have applied also to a case where there had been a special arbitrator designated by agreement, or where by agreement a standing arbitrator has been appointed.

I really cannot come to the conclusion that a reference to arbitration in an agreement authorized by an Act of Parliament is a reference to arbitration by or under the provisions of any general or special Act of Parliament.

BRETT, L.J.:—

In this case a difference has arisen between two railway companies, which difference they themselves have by an agreement under their own hands provided for. They have by an agreement under their own seals agreed that in case of such a difference as this the matter should be settled by an arbitrator to be appointed in a particular way and with particular powers, but it is said, notwithstanding that agreement to which the two parties have come, one of them, upon application to the Railway Commissioners, may force the other to have that difference decided by the Railway Commissioners. It is said that this power is given to one party by the 8th section of the *Regulation of Railways Act*, and the argument was necessarily carried to this extent, that the 8th section includes all differences of whatever kind which may arise between two railway companies. In other words, it is suggested that the proper reading of that section is, "Where any difference arises between two railway companies such difference shall at the instance of any company party to that difference be referred with their consent to the Railway Commissioners." Suppose that had been the intention of the Legislature, how exceedingly easy it would have been for the Legislature to have said so. What an extraordinary involution of phrase have they entered into in the first part of sect. 8, if it were intended to mean what I have said. There is that objection, therefore, to such a reading. But it is necessary to consider what would have been the result of such a reading. The result of such a reading it could not be denied must have been this—that even although the parties should by agreement determine that a difference which had already arisen between them should be decided by an arbitrator named by them in that agreement, and that there should be contained in that agreement a clause that neither party would apply to the Railway Commissioners, and that the only person who should decide between them should be the person named by them both, by virtue of this 8th section one of them might break such an agreement, and the Commissioners would have jurisdiction without the consent of the other party to entertain and determine the difference. It seems to me almost impossible to suppose that the Legislature would have so enacted. But when we look at the terms of the section there are three phrases which are used in the section oddly enough, as is so often the case in Acts of Parliament. In the first part it is, "Where any difference is under the provisions of any general or special Act required or authorized to be referred"; in the second part they use the terms, provided "that it shall not apply to any case in which any arbitrator has in any general or special Act been designated." There, instead of the words "under the provisions of," it is, "in any general or special Act." Then there is the third expression, "or in which a standing arbitrator having been appointed under any general or special Act." It seems to me on looking at that clause that the two first phrases are identical, but that the third one is different from the other two. It seems to me that the phrase, "under the provisions of any general or special Act required or authorized," is really just the same as if they had put it, "in any general or special Act required or authorized." It is the same phrase as the second. The real meaning of the word in one case and the phrase in the other is, "Where any difference is by the terms of any general or special Act required or authorized." If that be the true meaning of it, then there is nothing in the terms of any special Act in this case which requires or authorizes a reference. I take the real meaning of the 8th section to be that it applies to certain particular differences which may be pointed out in distinct terms in the special Act or in the general Act, and which then requires or authorizes that particular difference in terms if it arises to be referred to arbitration. But it is said, as to all differences arising between railway companies, after all, if there is to be an arbitration, that arbitration must be under the authority of an Act of Parliament. At first it struck one that it might be so, but I have come to the conclusion upon consideration that with regard to any differences arising in the course of their business railway companies have power to agree to a reference without any authority of any Act of Parliament at all. It was suggested that that was not so, and that there must be an authority given to them to agree to arbitration either in some special Act, or else that it is given by the *Arbitration Act* of 1859, s. 2. I cannot think that is the meaning of the statute of 1859. If I am right in the first proposition, it would be a superfluous enactment. I think that the reading of the Act of

1859 is that which was suggested by Mr. *Webster*, namely, that it does not give power to railway companies to agree to a reference, but that in a succession of clauses it shews the particular mode or manner in which an arbitration is to be conducted, and that the intention was to draw up a code for such arbitrations which by reference to that statute may be at once shortly incorporated into every special Act. That Act gives no authority to railway companies to agree to a reference, which authority was not wanted, but it does point out to railway companies how they may agree to a reference in a particular form and manner.

Sect. 9 of the statute seems to me to be very strong to shew that the construction which I have put on sect. 8 is the right one, because I cannot, by any mode or rule of construction, suppose that the 9th section does not include the case of a difference between two railway companies. If it does, then there are cases evidently in the mind of the Legislature where the Commissioners may have the power of determining a dispute between railway companies with the consent of both companies, and that would go to shew that the differences which are mentioned in sect. 8 are not all differences, but only the differences, as I have said, which are mentioned in the terms of any general or special Act.

We are then met by the decision of the Railway Commissioners themselves. In 1875 the first case which is cited to us was heard (1). Strangely enough, notwithstanding the argument we have heard, on the first occasion when this question of their jurisdiction was challenged before them, they hardly entered upon the matter. They did not hear or call upon the counsel who were to support their jurisdiction, but at once, and without giving any reasons at all, determined that they had this jurisdiction. That being so in 1875, in 1878, when the second case was heard (2), they seemed to have been called upon to listen to counsel. The Lord Advocate and Mr. *Kay*, who I suppose did that which I think all counsel ought to do, insisted upon being heard. They no doubt adduced an elaborate argument before the Commissioners. Then the Commissioners decided this question, but I

(1) *Stokes Bay Railway and Pier Company* v. *London and South Western Railway Company*, 2 Nev. & Mac. 143.

(2) *Portpatrick Railway Company* v. *Caledonian Railway Company*, 3 Nev. & Mac. 189.

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think their judgment contains the decision and not the reasons for it. Therefore it hardly helps us.

We still have to consider the decision in this case of the Master of the Rolls himself. I cannot help thinking that upon this occasion the Master of the Rolls was as nearly as possible deciding the case in the way in which we now decide it. He seems to have had the greatest possible doubt.

COTTON, L.J.:—

In this case two railway companies, Plaintiffs and Defendants, have entered into an agreement with reference to certain matters connected with their lines, in which there is a clause providing for reference to arbitration. They could not have entered into that agreement as regards their lines without the authority of Parliament, and there was an Act of Parliament which authorized them to enter into the agreement as to matters relating to their lines, but that Act said nothing at all about any reference to arbitration.

The question is this, whether one of those parties has power against the will of the other to go before the Railway Commissioners, and that depends simply upon the 8th section of the Act as compared with the other sections. I say it depends on the 8th section, because it is the construction of that section helped by other parts of the Act under which the Respondents seek to go before the Railway Commissioners. The question is whether the Railway Commissioners have, under the circumstances, any jurisdiction, and, as I understand, the Master of the Rolls decided, and certainly it was the argument of the Commissioners before us, that under that section the Railway Commissioners, at the instance of one party only and against the will of the other, have a right to entertain the question in any difference capable of being referred. That is how it was put in argument by Mr. *Rigby*, and in substance I think it was what was decided by the Master of the Rolls. It is sufficient to say upon that point, that such a construction omits a large portion of the section, because sect. 8 is not, "where any difference arises between two railway companies, such difference shall at the instance of either party," but there follow words to which some effect must be given, "where any difference between a railway company or canal company is under the provisions of any general or special Act passed either before or after the passing of this Act required or authorized to be referred, such difference shall at the instance of any company party to the difference be referred to the Commissioners." "Such difference" points to certain specified differences. What is the difference previously described. It is not "any difference between railway companies," but "any difference which is under the provisions of any general or special Act authorized or required to be referred." The object, in my opinion, of introducing the words which follow "is," is to qualify or restrict the differences to be referred; and the power, at the instance of one party, to go before the Commissioners, is only where there is such a difference as comes within the entire description in the previous part of the sentence. One must consider what is the meaning of those words, "under the provision of any general or special Act required or authorized to be referred." From what I have said it will appear that, in my opinion, those words are restrictive, not having the effect of getting rid of the provisions of any general or special Act, but as descriptive of the kind of difference which may be compulsorily referred, and I think they mean this, that where in the Act of Parliament itself there is a provision which requires or authorizes a difference therein mentioned to be referred to arbitration, then either party may go before the Commissioners. There are plenty of instances in Acts of Parliament, where the reference may be compulsory on both parties. In the *Lands Clauses Act*, one railway company may wish to take the surplus land of another, and there may be other cases where the reference is compulsory: and so there may be many cases where, as between railway companies, there is a provision in an Act of Parliament which authorizes either party against the will of the other to withdraw the matter from any other mode of settlement, and to require the other party to go to arbitration. That, in my opinion, is the meaning of these words. I do not think that they mean that where under any Act of Parliament power is given to the railway company to contract for a reference, the Commissioners shall have jurisdiction: and even then, subject to what I shall say presently, it would not meet the present case, because the Act of

Parliament which authorized the agreement with reference to the working between those two railway companies did not contain any clause which gave them power or authority to contract with reference to going to arbitration.

It is said that every railway company which is authorized to go to arbitration must do so under some Parliamentary powers, because a railway company is a creature of Parliament. That comes to this, that every difference between railway companies may be compulsorily taken before the Commissioners at the instance of either party. That is not the wording of the section, and although it is very true that railway companies are the creatures of statute, it is hardly to be said that they are authorized by the statute to go to arbitration. They are created with all the powers incident to the purpose for which they are created, except so far as their Act expressly or by inference stops them. The answer to any such suggestion is, that if this were the meaning, the words of the clause would have been "any difference between any incorporated companies may be compulsorily referred."

There is another matter which must be referred to, although it has been to some extent dealt with. It is said that at least the Act of 1859 is a Parliamentary authority to go to arbitration. The words of the Act itself (sect. 2) are against the notion that it gives power not otherwise possessed by railway companies generally to go to arbitration, because it says that "they may agree to refer and may refer to arbitration in accordance with this Act," and the Act in question contains a number of clauses as to the appointment of arbitrators when the parties cannot agree, and giving the reference under it effect which it would not have unless it were under the Act. So the power there given to companies is to avail themselves of the provisions of the Act with reference to arbitration. The Act does not give them power to refer to arbitration.

There is one other matter which I wish to mention, as shewing to what a strange conclusion, in my mind, the contention of the other side would go, viz., that where Parliament has named an arbitrator, it is not to be taken before the Railway Commissioners; but if parties contracting between themselves have named an arbitrator, then the contract between the parties can be set aside. Now it seems to me that when parties have, without contracting between themselves, got a clause of an Act of Parliament which authorizes or requires them to go to arbitration without any further contract, Parliament might reasonably enact that the statutory provisions shall be altered. But contract between the parties is a very different thing, and one would expect that where the statute provides for one exception in favour of a special provision in an Act of Parliament, it should at least have made an exception where the parties by contract had done the same thing for themselves.

There is one other matter which I referred to in the argument, and which I will mention again. The 8th and 9th sections of the Act are very different in language, and if the 8th section was intended to deal with all differences between railway companies, it is extraordinary that there should be that difference of language between the 8th and 9th sections. No doubt the 9th section does include cases where both parties are not railway companies or canal companies, and does include cases of difference between an individual and a railway company, or between an individual and a canal company, but in my opinion it will be straining the construction of that section to say that it will not apply to a case where both parties are railway or canal companies, because it is impossible to say in such a case that the railway company or canal company is not a party to the difference. Probably what was contemplated there was, in the first instance, differences between railway companies and individuals, but in my opinion it extends to and applies to all differences where a railway company or a canal company is a party, notwithstanding that the other party may also be a railway company or a canal company.

Rule absolute for prohibition, with costs, against the *Limerick and Waterford Railway Company* in the Appeal Court and in the Court below.

The appeal as to the injunction dismissed with costs.

Solicitors: *R. R. Nelson*, Solicitor to the Board of Trade; *Terrell & Atkinson*.

M. W.

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May 5.

Ex parte TATTON. *In re* THORP.

Bankruptcy—Examination of Witness as to Property of Bankrupt—Production of Documents—Discretion of Court—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 96.

In determining whether an order for the production of documents should be made under sect. 96 of the *Bankruptcy Act*, 1869, the Court has to exercise a discretion.

From the examination of a person summoned for examination under sect. 96, at the instance of the trustee of a bankrupt, it appeared that a policy of insurance on the life of the bankrupt's wife, which had been effected by her before her marriage with the bankrupt, and which had been after the marriage assigned by the husband and wife to trustees, on trust for the wife for her separate use, had after the bankruptcy been assigned by way of mortgage, by a deed to which the bankrupt and his wife were parties; that the mortgage had been afterwards transferred to the witness; and that the wife had subsequently executed a deed assigning the equity of redemption to him:—

Held, that the witness must produce the mortgage deed, the deed of transfer, and the deed of assignment.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

On the 3rd of December, 1872, *Jane D. Grainger* (then the widow of *Joseph A. Grainger*, and previously to her marriage with him the widow of *Joseph Mather*) married *William Thorp*. Settlements were executed prior to her first and her second marriage, but she was an infant at the times of both these marriages. She had effected a policy for £4700 upon her own life and had (as was alleged) paid the premiums out of her separate estate, and she had, on the 16th of January, 1872, while she was the wife of *Grainger*, assigned this policy by way of mortgage to *Robert Stedman*. On the 6th of February, 1873, the mortgage debt having been paid off, *Stedman* re-assigned the policy, by a deed to which Mr. and Mrs. *Thorp* were parties, to two trustees, upon trust for Mrs. *Thorp*, her executors, administrators, and assigns, for her sole and separate use as part of her sole property, free from the debts, control, interference, or engagements of her then present or any future husband. In the early part of the year 1877 *Thorp* was adjudicated a bankrupt. In the year 1879 the existence of the policy and the fact that it had been mortgaged to

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a Mr. *Newson* came to the knowledge of the trustee in the bankruptcy, and he afterwards ascertained that Mrs. *Thorp* died on the 8th of October, 1880. Mr. *Walter Tatton*, who had acted as her solicitor, was summoned by the trustee for examination in the Court of Bankruptcy, under sect. 96 of the *Bankruptcy Act*, 1869, respecting the bankrupt's property.

From his examination it appeared that the policy was in his possession. He stated that it was, by a deed dated the 9th of October, 1877, to which *Thorp* and his wife were parties, mortgaged to *Henry Newson*; that by a deed dated the 24th of June, 1878, *Newson* transferred the mortgage to himself; and that by another deed dated the 6th of January, 1880, Mrs. *Thorp* assigned the equity of redemption to him as purchaser. *Thorp* was not a party to this deed. The witness was requested to produce these three deeds, but he declined to do so. The Registrar made an order for production.

Tatton appealed.

Winslow, Q.C., and *Dryden*, for the Appellant:—

No reasonable ground has been shewn for suspecting that the bankrupt had any interest in the policy. It was the wife's separate property.

[JAMES, L.J.:—It appears from the recitals that the wife was an infant at the dates of both her first and her second marriage.]

The policy was created by means of her separate estate.

[JAMES, L.J.:—As at present advised, I do not see that any deed must be produced unless it has been executed by the bankrupt.]

Sect. 96 (1) does not apply.

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(1) Sect. 96 provides that "The Court may, on the application of the trustee, at any time after an order of adjudication has been made against a bankrupt, summon before it the bankrupt or his wife, or any person whatever known or suspected to have in his possession any of the estate or effects belonging to the bankrupt, or supposed to be indebted to the bankrupt, or any person whom the Court may deem capable of giving information respecting the bankrupt, his trade dealings or property, and the Court may require any such person to produce any documents in his custody or power, relating to the bankrupt, his dealings or property."

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A. Beddall, for the trustee:—

[JAMES, L.J.:—What right have you to see any deeds executed after the bankruptcy? If *Newson* had no title he could give none, and *Tatton* stands in the position of *Newson* and Mrs. *Thorp.*]

If the policy was separate property of the wife, then on her death it passed to the husband, on his taking out administration to her estate, and it would vest in the trustee in his bankruptcy. If the policy was not separate property, then the objection arises that the mortgage was made after the adjudication of bankruptcy. If the equity of redemption was sold at an undervalue, the trustee would be entitled to impeach the sale. Sufficient ground was shewn for the exercise of the discretion of the Court under sect. 96, and the Court will not on the appeal of a mere witness interfere with the decision of the Registrar.

Winslow, in reply:—

It is not a matter of discretion; there is no power to compel the production of title deeds unless sect. 96 applies. If this is separate estate, sect. 96 does not apply.

JAMES, L.J.:—

I am of opinion that the Registrar exercised his discretion rightly. No doubt sect. 96 is a very inquisitorial one, and the power which it gives should be exercised with considerable discretion. Beyond all question this policy was at one time the husband's property, subject to the wife's equity to a settlement; *primâ facie* it was his property. It was attempted to make it her separate property by a post-nuptial deed. Afterwards the policy was mortgaged to *Newson;* the mortgage was transferred by him, and the equity of redemption was sold to the transferee, who had been the wife's solicitor. The policy would have vested in the trustee in the bankruptcy, as representing the husband who survived the wife, and it appears to me that the trustee was quite right in calling for the production of the deeds which dealt with the policy after the bankruptcy. I think that the Registrar has exercised his discretion properly.

C. A.
1881
Ex parte TATTON.
In re THORP.

BAGGALLAY, L.J.:—

I am of the same opinion. I think the language of the section is wide enough to authorize the order, and that the circumstances were such as to justify the Registrar in making it. If the circumstances are such as the Appellant represents them to be, I do not see that he will be prejudiced by the order. I think it is quite right that the trustee should have an opportunity of seeing these deeds.

LUSH, L.J.:—

I am of the same opinion. I am greatly influenced by the fact that the deeds were executed after the bankruptcy, and after, as the evidence shews, the bankrupt had made several attempts to get out of the way.

JAMES, L.J.:—There must always be an exercise of discretion under this section, for it says that the Court "may" require the production of documents by the person under examination.

Appeal dismissed with costs.

Solicitor for Appellant: *Walter Tatton.*
Solicitors for Trustee: *Lumley & Lumley.*

W. L. C.

In re MITCHELL (A LUNATIC DOMICILED IN SCOTLAND).

C. A.
1881
April 30;
May 7.

Lunatic—Debenture—Lunacy Regulation Act, 1853 (16 & 17 *Vict. c.* 70), *s.* 141.

A debenture bond of a limited company, according to the constitution of which debentures were transferred by deed, and the deeds of transfer upon presentation to the company were registered in the company's book of mortgages, ordered to be transferred under sect. 141 of the *Lunacy Regulation Act*, 1853.

JOHN MITCHELL, who was domiciled in *Scotland,* became lunatic, and on the 15th of February, 1881, *Andrew Hendry* was duly appointed by the Lords of Council and Session *curator bonis* to the lunatic.

Mitchell was the holder of 100 £10 shares in the *Colorado Mortgage and Investment Company of London, Limited,* on which £2 10*s*. per share had been paid. The company was an English limited company.

Mitchell was also possessed of a bond or debenture of the same company, dated the 9th of June, 1877, by which the company covenanted with him for payment to him, his executors, administrators, or assigns, on the 11th of November, 1884, at their registered office in *London,* of £600, with interest at 5½ per cent. per annum, payable half-yearly to the bearer of the coupons accompanying the debenture. And the company by such debenture assigned to the creditor along with the other holders of their debentures, the property and undertaking of the company.

Mitchell was entered in the book of mortgages of the company as the holder of the above debenture. The debentures of the company were not transferable by delivery, but were transferred by deed, and the deeds of transfer upon presentation to the company were registered in the book of mortgages of the company.

Mitchell, by *Hendry* as his next friend and *curator bonis,* and *Hendry,* now presented their petition, asking that *Singer,* the secretary of the company, or some other fit person, might be appointed to make a transfer of the shares and debenture into the name of *Hendry,* and to receive the dividends thereon and pay the same to *Hendry,* and that, when so appointed, he might be ordered to transfer the shares and debentures, and pay over the dividends accordingly.

April 30. *Jason Smith,* for the Petitioner:—

The shares appear to be clearly within the 16 & 17 Vict. c. 70, s. 141, having regard to the decision in *Re Ives* (1), but some doubt is felt as to the debenture.

[JAMES, L.J.:—Within what words in section 141 do you bring it?]

I submit that it comes under the head of "Stock," which by the interpretation clause includes any security transferable in books kept by any company or society.

[JAMES, L.J.:—Can you say that this security is transferable in the books?]

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(1) 3 D. J. & S. 453. 9 Jur N.S. 611

It is submitted that according to the principle of *Re Ives* (1) it may be considered as so transferable, though a deed is requisite, a register of bonds being kept, so that the security may be regarded as transferable in the books.

The company and secretary were served, but did not appear.

THE COURT (*James*, *Baggallay*, and *Lush*, L.JJ.) considered that the order might be made, but suggested that the *curator bonis* ought to give security.

Jason Smith:—Section 141 says nothing about security.

[BAGGALLAY, L.J.:—According to the practice in *England*, security should be given.]

The Court directed the petition to stand over for evidence that, according to the law of *Scotland*, the *curator bonis* would, if this property had been in *Scotland*, have been entitled to get it in without giving any further security.

Jason Smith stated that both the company and its secretary had been served, and one sum of 40*s*. tendered, but that the solicitor of the company asked for a second 40*s*.

JAMES, L.J.:—We are of opinion that the tender of one sum of 40*s*. was sufficient.

May 7. Evidence that security would not be required in *Scotland* in a similar case being produced, the order was made as asked by the Petitioner.

Solicitor: *W. F. Farmer*.

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(1) 3 D. J. & S. 453.

H. C. J.

C. A.

1881

May 12.

Ex parte LISTER. *In re* HALBERSTAMM,

Bankruptcy—Letters addressed to Bankrupt—Order for Redirection—Appeal—Person aggrieved—Locus Standi—Bankruptcy Act, 1869 (32 & 33 *Vict.* c. 71), s. 85.

Under sect. 85 of the *Bankruptcy Act*, 1869, an application for an order for the redirection of letters addressed to a bankrupt can only be made by the trustee in the bankruptcy.

The petitioning creditor has no *locus standi* either to make application, or to appeal from an order made on the application of the trustee if he thinks that order not sufficiently extensive.

If the trustee refuses to apply for such an order, or to appeal from an order made on his application, the petitioning creditor cannot apply to the Court himself.

Semble, that he might obtain authority to use the name of the trustee.

THIS was an appeal from a decision of Mr. Registrar *Murray*, acting as Chief Judge in Bankruptcy.

Ernst Halberstamm, *Joseph Segalla*, and *Adolphe Segalla* carried on business in partnership as merchants, in *London* and at *Bradford*. The two *Segallas* resided in *London*. *Halberstamm* resided at *Odessa*, and had never been in *England*.

On the 3rd of May, 1881, an adjudication of bankruptcy was made in the *London* Court of Bankruptcy against the two *Segallas*, the act of bankruptcy alleged being that they had departed out of *England* with intent to defeat or delay their creditors. A receiver of their property was appointed. On the 6th of May, on the application of the official solicitor of the Court, on behalf of Mr. Registrar *Brougham*, who was acting as trustee in the bankruptcy (no trustee having been as yet appointed by the creditors), and of the solicitor for the petitioning creditor, an order was made by Mr. Registrar *Murray*, as Chief Judge, under sect. 85 of the *Bankruptcy Act*, 1869, that all post letters directed or addressed to the bankrupts at their place of business in *London* should be redirected, sent, or delivered by the Postmaster-General, or officers acting under him, to the receiver at *Bradford*. The petitioning creditor considered that this order ought to have applied to all letters addressed to the bankrupts "trading under the firm of *Halberstamm & Co.*," and he applied to the Registrar to vary the order accordingly. The official solicitor appeared for the Registrar-trustee on the hearing of this application, and stated that he refused to concur in the application, being of opinion that the variation asked for was not within the terms of sect. 85. The Registrar refused the application. The Registrar-trustee declining to appeal, an appeal was presented on behalf of the petitioning creditor and the receiver.

Finlay Knight, for the Appellants:—

The petitioning creditor is a person aggrieved by the order and by the refusal of the Registrar-trustee to appeal from it, and is, therefore, entitled to appeal from it: *Bankruptcy Act*, 1869, ss. 20, 71.

[JAMES, L.J.:—What power have we to interfere? Sect. 85 says that the Court may make an order for the redirection of the bankrupt's letters "upon the application of the trustee."

Crump, for the Registrar-trustee:—

I do not make the application, because I think that that which is asked for is not within the section, but I do not oppose it.]

The trustee only refuses to appeal. The order was made on his application. We consider that in its present form it will be useless. Letters containing remittances of money or bills will be directed to the bankrupts under the name of the firm.

Crump, for the trustee, was not heard.

JAMES, L.J.:—

How can we get over the words of sect. 85, and make the order on the application of any one but the trustee? We must set the example of obeying the Act. Possibly you may be able to compel the trustee to allow you to use his name.

BAGGALLAY, L.J., concurred.

LUSH, L.J.:—

An order made on the application of the petitioning creditor

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Ex parte LISTER.
In re HALBERSTAMM.

would be entirely outside sect. 85. If you have any ground for complaining of the conduct of the trustee you can make a complaint to the Court.

Solicitor for Petitioning Creditor: *S. S. Seal*, agent for *Rawson, George, & Wade, Bradford.*

Solicitor for Trustee: *Aldridge.*

W. L. C.

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1880
V.-C. B.
May 27.
C. A.
1881
May 10, 13.

19 Ch D 26

ROXBURGHE *v.* COX.

[1878 R. 299.]

Army Agents—Set-off—Bankers' Lien—Value of Commission.

K., an officer in the army, mortgaged to *R.*, to secure £5000, all moneys which should be realized by sale of his commission. In December, 1877, *K.* obtained leave to retire from the army, and his commission was valued at £3000, which on the 6th of December, 1877, was paid by the Paymaster-General to *C. & Co.*, the army agents of the regiment, and was carried to the deposit account kept by *C. & Co.* with the Army Purchase Commissioners, there to remain till *K.'s* retirement was gazetted. *K.* kept an account current with *C. & Co.* as his bankers, which was overdrawn to the amount of £647. *K.'s* retirement was gazetted on the evening of the 18th of December, and as soon as *C. & Co.'s* office opened on the 19th, *R.* gave them notice of his security. *R.* having claimed payment of the £3000, *C. & Co.* claimed to retain out of it the £647:—

Held, by *Bacon*, V.C., that *C. & Co.* received the £3000 as *K.'s* bankers, and had a banker's lien upon it for the balance due to them, and were therefore entitled to retain the £647.

Held, on appeal, that as soon as *K.'s* retirement was gazetted the £3000 became money had and received by *C. & Co.* for his use, and for which he could have brought an action at law; that they had a right to set off the balance due to them against this demand; that this set-off was equally available against *R.*, of whose security *C. & Co.* had no notice until after their right to set off had arisen; and that, therefore, independently of any question of bankers' lien, *C. & Co.* were entitled to retain the £647.

BY deed dated the 13th of March, 1868, Lord *Charles Ker*, then an officer in the Scots Fusileer Guards, covenanted with the Plaintiff for the repayment, with interest, of a sum of £5000 advanced by the Plaintiff for his benefit, and also covenanted that all moneys which should be realized by the sale of his commission, or in respect of any exchange being made by him from his regiment, should (after and subject to the payment of the costs and expenses of and incidental to such sale or otherwise obtaining possession of such moneys and of all regimental charges or liabilities which might be properly payable to the War Office out of such moneys) be applied in or towards payment to the Plaintiff, his executors, administrators, or assigns, of the £5000 and interest, and that in the meantime the said moneys to be realized as aforesaid should (subject as aforesaid) stand charged with and be a security to the Plaintiff, his executors, administrators, or assigns, for such payment.

Shortly before December, 1877, Lord *Charles Ker* applied for leave to retire from the army in pursuance of *The Regulation of the Forces Act*, 1871, which permission was granted.

The Defendants were the duly appointed army agents of the Scots Fusileer Guards. Lord *Charles Ker* while he held his commission kept a current account with them as his bankers.

The value of the commission was settled at £3000, and on the 6th of December, 1877, this sum was paid by the Paymaster-General to the Defendants, who, pursuant to the general directions of the Army Purchase Commissioners, carried it to the deposit account kept by themselves with the Commissioners, to remain there until the retirement of Lord *Charles Ker* was gazetted.

On the 10th of December, 1877, the Defendants wrote to Lord *Charles Ker*, "Having been authorized by the Army Purchase Commissioners to pay to you on your name appearing in the *London Gazette* the sum of £3000 on account of the value of your commission, we beg to hand you a receipt for the amount, which be pleased to stamp, sign, and return to us at your earliest convenience, in order that as soon as you are gazetted no time may be lost in placing the amount to your credit or otherwise disposing of the same as you may direct, less any regimental claims which may be preferred against you."

On the 18th of December the retirement of Lord *Charles Ker* was gazetted. There were no regimental claims against him. The Plaintiff's solicitors posted to the Defendants a notice of the Plaintiff's charge, which was received by the Defendants on the morning of the 19th. They also served at the office of the Defendants a similar notice on the morning of the 19th, a few minutes before the regular time for opening the office. Other notices of charges were received by the Defendants on the same day.

At the time when Lord *Charles Ker* was gazetted out he owed to the Defendants £647 on his account current with them, and the Defendants claimed to retain that sum out of the £3000.

The receipt mentioned in the letter of the Defendants was returned to the Defendants on the 31st of January, 1878, duly signed by Lord *Charles Ker* and accompanied by a copy of the notice of the Plaintiff's claim.

The Plaintiff, in April, 1878, commenced his action, claiming that his charge of the 13th of March, 1868, might be declared a first charge on the £3000; that the Defendants might be ordered to pay the £3000 to the Plaintiff, with interest at £5 per cent. from the time of their receiving it till the payment to the Plaintiff; and further relief.

The claims of other incumbrancers were subsequently withdrawn, and the only question remaining for decision was whether the Defendants were entitled to retain the £647 out of the £3000.

The action was tried before Vice-Chancellor *Bacon* on the 27th of May, 1880.

Hemming, Q.C., and *B. B. Rogers*, for the Plaintiff:—

Our view of the Queen's Regulations of 1873 (par. 20, sect. 4) is, that where the commanding officer certifies (as here) that there are no regimental claims, the money goes straight to the officer or his assigns.

It is an accidental circumstance that *Cox & Co.*, besides being the army agents of Lord *Charles Ker*, were also his private bankers. That does not give them a right to claim a banker's lien upon the commission moneys. A banker has no lien against a customer on anything except that which comes to him in his capacity of that customer's banker. They could not assert a banker's lien unless they had carried, or at any rate had a right to carry, the money to Lord *Charles Ker's* banking account without his consent. But they never did so carry it, and had no right to do so, as the terms of their own letter clearly admit. To carry the commission money to the banking account of Lord *Charles Ker* without direction, would be a breach of trust in their capacity as army agents holding the fund.

We are entitled to the commission money without any deduction.

Sir *H. Jackson*, Q.C., *Chitty*, Q.C., and *A. T. Watson*, for the Defendants, were not called upon.

BACON, V.C. :—

In my opinion there is nothing for the Defendants to answer in this case. There seems to be a notion that, because this money is issued by public authority in respect of Lord *Charles Ker's* commission, it differs from any other money that belongs to him. It is said that the regimental agent is a sort of trustee. Trustee for whom? For the man to whom the money belongs. The regimental agent happens to be also his banker, and unless some new law is to be introduced which deprives bankers of the lien they have always hitherto possessed and enjoyed, there is no reason in the world why Messrs. *Cox* should part with money, over which they have a lien, to Lord *Charles Ker*, or to any person to whom he may assign it. The reference to the Regulations is perfectly intelligible. The Government, in paying this sum of money to an officer when he retires, takes care there shall be no regimental claims unsatisfied. That is the only restriction. The old Regulations and the new Regulations are just the same, and have the same object. It is an unquestionable fact upon the pleadings and evidence before me, and especially upon the admission, that Messrs. *Cox* were the bankers of Lord *Charles Ker*, and that in their bank account, as I read the admission, he was indebted to them in the sum of £647. Why are they not to have a lien because they sustain two characters? As regimental agents they are trustees of the money of Lord *Charles Ker*, and being his bankers they hold it subject to all rights which bankers possess. The letter which has been referred to is a formal letter, which would be sent under all circumstances, and the object is to procure from Lord *Charles Ker* a receipt which may be handed by Messrs. *Cox* to the office or authority from which they received the £3000. [His Lordship read the letter, and continued:—] In other words, they say, "Send us a receipt that we may send it to the proper office, thereupon we will place the money to your proper credit, and we, your bankers, will deal with it according to law." In my opinion, there is no ground whatever on which the claim of Messrs. *Cox* to retain the £647 can be disputed.

C. A.

The Plaintiff appealed. The appeal came on to be heard on the 10th of May, 1881.

Hemming, Q.C., and *B. B. Rogers*, for the Appellant:—

A banker has no lien upon money of his customer which comes into his hands unless it comes to him in his capacity of that customer's banker. This money came to *Cox & Co.* as agents of the Government to pay to the retiring officer. As such agents they were not Lord *Charles*' bankers. It is an accident, though one of frequent but not invariable occurrence, that the officer banks with the same person who acts as army agent. The general lien of bankers and brokers who enjoy that privilege is strictly limited to money or property which comes to them in the course of their employment as bankers or brokers. There are many authorities to this effect, but the law so far is too clear to need authorities.

Here *Cox & Co.* were only the hand of the Government to transmit this money to Lord *Charles Ker*. The Government employs *Cox & Co.* to pay moneys to certain officers irrespective of any question whether the officers keep an account with *Cox & Co.* The case is analogous to that of a clerk told by his employer to take money to *A. B.*, and get a receipt from him. Surely it cannot be contended that the clerk can set off a debt due to him in his own right from *A. B.* So, again, if I give a cheque on my bankers to *X. Y.*, who asks for payment over the counter, can it be said that the bank could refuse payment and retain the cheque against money owing to them by *X. Y.*, if he happened to have an overdrawn account at the same bank? The Vice-Chancellor puts the case exclusively on the ground of banker's lien.

[JAMES, L.J.:—We need not consider that unless you can get over the question of set-off.]

We say there is no set-off. Till the commission money is handed to the agent the officer's claim is only against the Government. After the money has been received and the retirement gazetted, the agents become trustees for the officer, and cannot set off a claim in their own right. *In re Haselfoot's Estate* (1) is against our contention, but it is overruled by *Talbot* v. *Frere* (2), where it was held that a mortgagee who had surplus proceeds of sale in his hands could not set off against them a debt which the mortgagor owed him. The doctrines laid down in the judgment in that case completely sustain our contention.

[JAMES, L.J.:—That was a case of trustee and *cestui que trust.* Nobody could sue at Common Law for the surplus proceeds of sale of the mortgaged estate. The present is a case of a Common Law demand for money had and received.]

Any trustee who has a clear sum of money in his hands payable to a *cestui que trust* might be sued at law under the equitable count of money had and received.

We submit that there is no distinction in principle, and that the money here was trust money in the hands of *Cox & Co.* as much as the money in *Talbot* v. *Frere.* There was no private debt by *Cox & Co.* to Lord *Charles Ker*, and the two rights being in different capacities there is no set-off even against Lord *Charles* if he had been Plaintiff: *Lambarde* v. *Older* (3). Still less can there be against the Duke, who claims under an assignment long prior to *Cox & Co.'s* claim.

Chitty, Q.C., *Davey*, Q.C., and *A. T. Watson*, *contrà*, were not called upon.

JAMES, L.J.:—

I really have no doubt in this case, which, in the view I take of the facts, seems to me to be a very simple one, and to involve no questions as to trustees and *cestuis que trust*, and any peculiar rights arising from that relation.

The Government paid to Messrs. *Cox & Co.* a certain sum of money to the use of Lord *Charles Ker*. He has assented to that

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(1) Law Rep. 13 Eq. 327.
(2) 9 Ch. D. 568.
(3) 17 Beav. 542.

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payment being made to them for his use. After that Lord *Charles Ker* had a claim against them which made them liable, not merely to a suit in equity, but to an action at law by Lord *Charles Ker* for the money, as being money paid to his use. It appears to me that beyond all doubt they could have pleaded a set-off in that action for the money that was due to them from him. Both rights were Common Law rights. There was a simple contract debt due from *A.* to *B.*, and at the same moment a simple contract debt due from *B.* to *A.* There was a claim by Lord *Charles Ker* for money had and received to his use, and a claim by *Cox & Co.* for money due, so that if the action had been brought by Lord *Charles Ker* himself the right of set-off would have been clear. It is not brought by him, but it is brought by a person who claims as assignee of the *chose in action* belonging to him. Now an assignee of a *chose in action*, according to my view of the law, takes subject to all rights of set-off and other defences which were available against the assignor, subject only to this exception, that after notice of an assignment of a *chose in action* the debtor cannot by payment or otherwise do anything to take away or diminish the rights of the assignee as they stood at the time of the notice. That is the sole exception. Therefore the question is, Was this right of set-off existing at the time when the notice was given by the Duke of *Roxburghe?* Under the old law the proper course for the Duke to take would have been, not to come into a Court of Equity, but to use the name of Lord *Charles Ker* at law; the proper course for an assignee of a *chose in action*, unless there were some equitable circumstances to justify him in coming to a Court of Equity, having been to sue at law in the name of the assignor. In that case set-off could have been pleaded as against the assignor, and in the present mode of procedure that defence is equally available,

The Vice-Chancellor decided the case on the ground that Messrs. *Cox & Co.* had a banker's lien. We have not heard out the Appellant's argument on that point, and I therefore give no opinion upon it, and do not express any dissent from the conclusion to which the Vice-Chancellor came, but my conclusion is arrived at independently of that question, and on the ground that there is a clear right of set-off.

BAGGALLAY, L.J.:—

I am of the same opinion. Some time before the 6th of December, 1877, Lord *Charles Ker* obtained permission to retire from the army. Under the provisions of the Act of 1871 the value of his commission was estimated at £3000, which sum was in the ordinary course paid by the Paymaster-General on the 6th of December to Messrs. *Cox & Co.*, who were the properly constituted agents of the regiment in which Lord *Charles Ker* held his commission. According to the usual practice and the rules of the service which govern the army agents in these matters, that sum of £3000 was carried by Messrs. *Cox & Co.*, not to any account between themselves and Lord *Charles Ker*, but to a deposit account between themselves and the Commissioners, there to remain until the retirement of the officer was notified in the *Gazette*. The *Gazette* notice of his retirement appeared on the evening of the 18th of December, and in accordance with the rules to which I have referred that sum of money then standing to the account of the Army Purchase Commissioners became payable to Lord *Charles Ker* himself. If at that time Lord *Charles Ker* had demanded that sum of £3000, Messrs. *Cox & Co.* would have been entitled to set off any sum of money in which he was indebted to them, subject of course to their not having received notice of a valid charge created on that fund previously to the time when the right of set-off arose. It is admitted here that there was no notice whatever given to Messrs. *Cox & Co.* of the present claim of the Duke of *Roxburghe* until the morning of the 19th of December, and, in point of fact, any notice given by him before the money came into the possession of Messrs. *Cox & Co.* would have been ineffectual, as was decided in the case of *Somerset* v. *Cox* (1), which has been repeatedly recognised and followed. There was therefore no notice given by the Duke of *Roxburghe* to Messrs. *Cox & Co.* before the morning of the 19th which could have created a valid charge on the money in the hands of Messrs. *Cox & Co.*, and this was after the right of set-off had arisen. I think that the conclusion at which the Vice-Chancellor arrived was correct, and though we decide the case on another ground, I do not express any dissent from the view expressed by him of the rights of Messrs. *Cox & Co.* in respect of a lien as bankers.

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(1) 33 Beav. 634. 10 Jur NS 357

LUSH, L.J.:—

This case appears to me to be free from any reasonable doubt. As soon as the retirement of Lord *Charles Ker* was gazetted, there being, as it appears, no regimental claims, the £3000 became Lord *Charles Ker's* money in the hands of Messrs. *Cox & Co.*, and he might undoubtedly have brought an action at Common Law immediately for that £3000 as for money had and received for his use. At that very time Lord *Charles Ker* owed Messrs. *Cox & Co.* a sum of £647, and they might undoubtedly have pleaded a set-off of that amount in that action. That is exactly the case before us; there is a Common Law claim, on the one hand, for £3000 which Messrs *Cox* held to and for the use of Lord *Charles Ker*, and a claim, on the other hand, to set off against that payment a debt of £647 which Lord *Charles Ker* owed to them. The £3000 became money in their hands the property of Lord *Charles Ker*, and their right of set-off arose before the notice was given by the Duke of *Roxburghe* of his assignment.

Solicitors for Plaintiff: *W. & A. Ranken Ford.*
Solicitors for Defendants: *Fladgate, Smith, & Fladgate.*

H. C. J.

LYON *v.* TWEDDELL.

[1879 L. 142.]

C. A.
1881
May 19.

Partnership—Dissolution by Court—Date from which Dissolution is ordered—Terms of Dissolution.

In an action for dissolution of partnership on the ground of disputes between the partners, where there is no distinct breach of the partnership articles, the dissolution will not be made retrospective, but will be ordered from the date of the judgment.

Besch v. *Frolich* (1) followed.

The terms of dissolution in such a case as to return of premium and other matters are within the discretion of the Judge, and his conclusions will not be interfered with by the Court of Appeal except on very sufficient grounds.

ON the 14th of May, 1875, the Plaintiff and Defendant entered into an agreement for partnership as general practitioners in medicine, at *Houghton-le-Spring*, in the county of *Durham*. The articles provided that the Plaintiff should pay a premium of £600 at once, and a further sum of £500 on the 14th of April, 1879. The articles contained no provision for the dissolution of the partnership during the continuance of the life of the partners.

Differences having arisen between the partners, the Plaintiff brought the present action asking for a dissolution of the partnership (2). Part of the first premium and the whole of the second premium were still unpaid.

The action was heard on the 29th of June, 1880, when Vice-Chancellor *Bacon* gave judgment that the partnership should be dissolved as from the date of issuing the writ in the action (the 4th of June, 1879), and that in taking the accounts, so much of the first premium of £600 as had not been paid should not be charged to the Plaintiff, and that he should not be charged with any part of the second premium of £500.

The Defendant appealed from this judgment.

Davey, Q.C., and *J. G. Wood*, for the Appellant:—

The judgment is erroneous in declaring the dissolution from the issue of the writ and not from the date of the judgment. This point was expressly decided in *Besch* v. *Frolich* (1), in the case of dissolution on account of the lunacy of a partner, and the same principle applies to the present case, where the dissolution is rendered necessary by incompatibility of temper on the part of the partners. It would be very inconvenient to take the accounts from an earlier date than the decree, when the public have been dealing with both parties as if the partnership was still subsisting.

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(1) 1 Ph. 172.

(2) The case is reported on an interlocutory application respecting the delivery of interrogatories, in 13 Ch. D. 375.

We also contend that the judgment was inequitable, in depriving the Defendant of the future payments of premium.

Caldecott, for the Plaintiff:—

The inconvenience of taking the accounts from an earlier date than the decree applies equally to a case where the partnership is a partnership at will, in which case the Court dates the dissolution from the commencement of the action: or to a case where the partnership is dissolved for a positive breach of the articles, when a retrospective decree would also be made. But, in truth, although the inconvenience might be great in taking the accounts of a mercantile partnership, it would be very small in a partnership of this nature. With respect to the premiums, we contend that the disagreement was brought on entirely by the Defendant's conduct.

JESSEL, M.R.:—

As regards the first point, which is the most important as a matter of law, though probably not of much importance to the parties, I am of opinion that it is most convenient to date the dissolution of the partnership from the judgment and not from the issue of the writ. What is the object of suits like the present? They are not for the purpose of carrying into effect the partnership articles, but of calling for the interference of the Court, on equitable grounds, that is to say, because the continuance of the partnership would be so disadvantageous to the parties, that the Court ought to put an end to it. The partnership exists until the judgment is pronounced. This is the principle on which the Court ought to act; but we have also the fact that it would be

(1) 1 Ph. 172.

generally very difficult to take the accounts on the basis of a retrospective dissolution of the partnership. That affords an additional reason for dating the dissolution from the judgment.

Then, with respect to the second point, namely, the direction which the Vice-Chancellor has given as to the premiums, it is the duty of the Court when dissolving a partnership on equitable grounds to decide upon what fair terms the dissolution should be made. This has been treated in the argument as a simple question of return of part of the premiums. But that is only one element in the question. It is the duty of the Court to look at all the facts, and do what is equitable between the parties. The Vice-Chancellor has had all the facts before him and has come to a conclusion; and this Court ought not to interfere with his discretion except upon very sufficient grounds. I see no sufficient ground for differing from the Vice-Chancellor; on the contrary, if I had heard the case I should probably have come to the same conclusion as he did. That part of his judgment, therefore, will not be interfered with.

James, L.J.:—

I am of the same opinion. Upon the first question, namely, as to the date of the dissolution, I think it is a matter of principle that where the dissolution is not for a breach of duty under the articles, or of good faith, but for incompatibility of temper, the words of the Lord Chancellor in *Besch* v. *Frolich* (1) apply equally to such a case as to a dissolution on the ground of lunacy. Therefore the dissolution must be from the date of the judgment, although I do not say that it ought not to be from an earlier date if there had been any actual misconduct or breach of the partnership articles.

On the second point, I think that the terms of dissolution are a matter of judicial discretion for the Judge who hears the cause, and I do not feel disposed to interfere with the Vice-Chancellor's conclusion.

Lush, L.J.:—

The first point for our decision is an important one, and it is

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very desirable that it should be settled. It is always undesirable and productive of inconvenience to give the dissolution of a partnership a retrospective operation, and this would be especially the case in a mercantile partnership. There are, indeed, cases where it is impossible to avoid it, as where it is rendered necessary by the stipulations of the partnership articles. But in such a case as this, where articles are silent on the subject and the dissolution is decreed on account of no distinct breach, but is the result of faults on both sides, so that the parties cannot get on together, I think the observations of the Lord Chancellor in *Besch* v. *Frolich* (1) apply with even greater force than to a case of lunacy. On every ground it is desirable that the dissolution should be from the date of the judgment.

On the second point, I entirely agree with my colleagues.

There will be no costs of the appeal.

Solicitors: *Rogerson & Ford*; *Shum, Crossman, & Co.*

M. W.

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Ex parte LADBURY. *In re* TURNER.

Trustee in Bankruptcy—Disclaimer of Lease—Leave of Court — Power to impose Conditions—Bankruptcy Act, 1869 (32 *&* 33 *Vict. c.* 71), *s.* 23—*Bankruptcy Rules,* 1871, *r.* 28.

19 Ch D 123,
22 Ch D 384
389, 390-1
395,
24 Ch D 279

In giving leave to the trustee in a bankruptcy to disclaim a leasehold interest of the bankrupt, the Court has, under rule 28 of 1871, power to impose a condition (such as the payment to the lessor of the rent in full up to the date of the disclaimer) even though no third party has acquired from the bankrupt an interest in the lease.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

On the 1st of August, 1874, a lease was granted by *John Stephens* to *T. T. Turner*, of some stables in *Charlotte Street, Pimlico*, for a term of 22¾ years from the 24th of June, 1874, at a yearly rent of £160 per annum for the first five years of the term, and at a yearly rent of £170 for the remainder of the term. On the 19th of November, 1879, *Turner* filed a liquidation peti-

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tition. The trustee in the liquidation occupied the property only for the purpose of seeing whether the lease was worth keeping, and paid the rent to the 24th of June, 1880, and then, on the 10th of February, 1881, gave notice to the lessor of an application to the Court for leave to disclaim the lease. The Registrar gave the trustee leave to disclaim upon his paying to the lessor the rent of the premises up to the date of the disclaimer, and giving possession of the property so far as lay in his power.

Bigham, for the Appellant, the trustee:—

By sect. 23 of the Act an absolute right is given to the trustee to disclaim a lease of the bankrupt, and the lessor's remedy is to prove in the bankruptcy for any injury done to him by the disclaimer (1). Rule 28 of 1871 was intended only to protect the interests of third persons who may have acquired an interest in the lease from the bankrupt; it was not intended to operate as between the lessor and the trustee. It cannot repeal the provisions of the Act. In *Reed* v. *Harvey* (2), the Queen's Bench Division held that a trustee can disclaim a lease without the leave of the Court.

[LUSH, L.J.:—We held that a disclaimer without the leave of the Court is still a disclaimer. The trustee may be liable for disclaiming without leave.]

That is a reason for his asking for leave. But, unless the rights of third parties would be interfered with, the Court ought *ex debito justitiæ* to give leave to the trustee without imposing any terms. In the present case the trustee has not had any beneficial occupation of the property.

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(1) Sect. 23 provides that "When any property of the bankrupt acquired by the trustee under this Act consists of land of any tenure burdened with onerous covenants . . . the trustee, notwithstanding he has endeavoured to sell, or has taken possession of such property or exercised any act of ownership in relation thereto, may, by writing under his hand, disclaim such property, and upon the execution of such disclaimer the property disclaimed shall, . . . if the same is a lease, be deemed to have been surrendered on the same date" (*i.e.* the date of the order of adjudication) . . . "Any person injured by the operation of this section shall be deemed a creditor of the bankrupt to the extent of such injury, and may accordingly prove the same as a debt under the bankruptcy."

Rule 28 of 1871 provides that the trustee shall not execute a disclaimer of a leasehold interest of the bankrupt "without the leave of the Court being first obtained for that purpose; and upon any application to the Court for such leave, notice of the desire of the trustee to disclaim such interest shall be given to such person or persons as the Court shall direct, and such order shall be made thereon as the Court shall think fit."

(2) 5 Q. B. D. 184.

S. Woolf, for the lessor, was not heard.

JESSEL, M.R.:—

It appears to me that if rule 28 is valid the applicant must submit to its terms. He comes, under the provisions of the rule, to ask the leave of the Court to disclaim the lease, a leave which is not required by the Act, and the Court has a discretion to impose such conditions as will do justice. When the rule says that such order shall be made "as the Court shall think fit," it does not mean that the Court may act upon mere caprice, but it gives the Court a judicial discretion. The trustee has used the property since his appointment and up to the time of the disclaimer for a very proper purpose, viz., for the purpose of seeing whether he can make any benefit of it for the debtor's estate. The Registrar has said, You have had the use of the property for the benefit of the estate, and have deprived the landlord of the benefit of the possession of it for this period, and I will give you leave to disclaim only on the terms that you shall not get that benefit for the estate at the expense of the landlord. That is all that the Registrar has done. It appears to me that his order is not only a right one, but that it is required by justice. If rule 28 be *intra vires*, the Registrar's order is right; if the rule be *ultrà vires*, the trustee should not have come to ask the leave of the Court.

JAMES, L.J.:—

I am of the same opinion. It appears to me that rule 28 was intended to mitigate the injustice which might be caused by sect. 23; it gives the Court power to impose terms, and the Court ought to impose such terms as will meet the justice of the case. Whatever may be the effect of a disclaimer by a trustee without the leave of the Court, I would recommend any trustee in bankruptcy to think once, to think twice, and to think thrice, before he ventures to disclaim without the leave of the Court.

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LUSH, L.J.:—

I am of the same opinion. By virtue of the disclaimer the landlord will lose his right of distress for rent, and he will be unable to sue the trustee on the covenants in the lease. It is because there is no remedy for the landlord for what he will lose, that power is given to the Court to impose terms, for that is the only way in which the landlord can be compensated.

Solicitor for Trustee: *E. W. Owles.*
Solicitor for Lessor: *John Fraser.*

W. L. C.

EARL DE LA WARR *v.* MILES.

[1878 D. 154.]

C. A.
1880
V.-C. B.
Feb. 18, 19, 20; *March* 2, 3, 4, 5, 9, 10, 11; *April* 14.
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Feb. 5, 7; *March* 14, 15, 18, 19, 21.

Common—"Common Pasturage and Herbage"—Jus secandi vel falcandi—Common of Estovers—Prescription—Profit à prendre in alieno solo—2 & 3 Will. 4, *c.* 71, *s.* 1.

Previous to the disafforestation and grant of *A. Forest* in 1677, the Crown was absolute owner of the soil of the forest and possessed of all the rights belonging to such ownership including vert and venison. The tenants of the adjoining manors had customary rights of common of pasture, herbage, and pannage, but the Court Rolls and other documents contained no evidence of any customary right in the commoners to cut and carry away from the forest brakes, fern, and litter, except by permission of the forest officers, and afforded negative evidence that no such right was ever claimed or lawfully exercised.

See case

In a suit instituted in 1691, for the purpose of determining how much of the forest might properly be inclosed having regard to the rights of common, the commoners by their answers claimed rights of pasturage, and pannage for swine and, as to such of them as had houses, certain quantities of fuel wood for their houses, but made no claim in respect of any other estovers. By the decree made in 1693, after allotting to the owners for inclosure and improvement portions of the forest within which the commoners were to be excluded and debarred from any common of pasture, herbage, or pannage, the residue of the forest (containing 6400 acres) was allotted to remain open and uninclosed, "and the said defendants, their heirs, tenants, and assigns, and all other persons having right of common in the said forest according to their respective interests therein, shall from time to time have and take the sole common pasturage and herbage of all and every the lands allotted and left for common as aforesaid"—the owners, their heirs and assigns, tenants and farmers, being for ever excluded "from having or claiming any common of

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19 Ch D 291
20 Ch D 385
— 755.
7 App Cas 636
11 QBD 717

pasture or herbage upon or in the said lands so left for common as aforesaid."

In an action brought by the owner of the inheritance in 1878 to restrain one of the commoners from cutting and carrying away brakes, fern, and litter from the 6400 acres, for use upon the copyhold tenement in respect of which he had his right of common, the defendant claimed this right as one of the commoners entitled to the benefit of the decree of 1693, and also alternatively by prescription in respect of his particular tenement:—

Held, by *Bacon*, V.C., and by the Court of Appeal, 1. That upon the construction of the decree of 1693, by which the respective rights of the lord and the commoners were defined and determined, the right of the commoners over the 6400 acres was limited to common of pasturage and herbage, and did not include the right to cut and carry away the brakes, fern, heather, and litter growing therein.

2. That the existence at the date of that decree of any special custom authorizing the commoners to cut and carry away brakes, &c., and litter in that which had been a royal forest, had not been established, and was negatived by the absence of any claim to such a custom by the commoners in the suit in which that decree was made.

3. That evidence of usage subsequent to the date of the decree of 1693 could not affect the construction of that decree, which in its terms was clear and unambiguous.

Held, by *Bacon*, V.C., that the alternative claim to the alleged right by prescription in respect of the particular tenement being a claim of a *profit à prendre in alieno solo* could not be sustained.

Held, on appeal, that as the Defendant and his predecessors in title were shewn to have claimed to take, and to have actually taken, as of right and without any permission from the lord, litter from the 6400 acres for the use of the tenement for upwards of sixty years immediately before the action, they had, under the *Prescription Act* (2 & 3 Will. 4, c. 71), acquired a right to do so, although they had claimed to do the acts complained of under the mistaken supposition that all the commoners were entitled to do them.

In order to establish a right under the *Prescription Act*, it is only necessary to shew that the benefit claimed has been actually enjoyed by the claimant for the requisite period as of right and not by permission, and that the right claimed is one which could have a legal origin by custom, prescription, or grant, and it is immaterial on what ground the claimant rested his alleged right to enjoy it.

THIS was an action by Lord *De la Warr*, as lord of the manor of *Duddleswell* and owner of a portion of the soil of *Ashdown Forest*, in *Sussex*, subject to rights of common therein, the extent of which was the question in dispute, to try the right asserted by the commoners to cut and carry away brakes, fern, heather, and litter in the forest for the use of their tenements.

Ashdown Forest, also known as *Lancaster Great Park*, comprised about 13,991 acres in *Sussex*, between *Tunbridge Wells* and *East*

S.C. as to costs of the [illegible]
19 Ch D. 80.

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Grinstead, of which the kings and queens of *England* were seised in right of their Duchy of *Lancaster*, except during the period of the Commonwealth. The forest was disafforested by letters of patent of King *Charles* II., and by him granted in 1677 to the Earl of *Dorset* and others (through whom, under an uninterrupted series of life tenancies, the Plaintiff, Earl *De la Warr*, claimed title) by the description of "All that parcel of land called *Ashdown Forest* or *Lancaster Great Park* with the appurtenances, and all honours, manors, lands, tenements, and hereditaments, parcel thereof, in the county of *Sussex*, and all the walks, lodges, and enclosed grounds within the said forest and park, and the soil thereof parcel of the said Duchy situate in the parishes of *Maresfield*, *East Grinstead*, *Hartfield*, *Withyham*, and *Buxted*, or any of them, or elsewhere in the said county of *Sussex*, and all that the manor of *Duddleswell*, and all that the honour of *Aquila* being parcel or reputed parcel of the said forest or park, and all woods and underwoods, timber trees and other trees whatsoever growing or being within the said forest," together with other hereditaments, rights, and privileges to the same premises respectively belonging.

In 1691 the Earl of *Dorset* and the other persons claiming to be owners of the forest under King *Charles* II.'s grant filed a bill of complaint in the Duchy Court of Chancery against *John Nuneham*, *John Day*, and 142 other persons, who claimed rights of common of pasture and of estovers over the forest, praying that they (the plaintiffs) might be quieted in the enjoyment of what they had enclosed, and might go on in enclosing and improving and be quieted therein by injunction, and that multiplicity of suits might be stayed and prevented, and that the defendants might set forth their claims and right of common; and that in case it should appear that they (the defendants) ought to have common in the forest, they might shew why the improvement thereof should not be proceeded with, they having proportionable satisfaction set out to them in recompense for their interest therein by Commissioners in that behalf to be appointed by the Court.

To this bill the defendants filed joint and several answers, and thereby they claimed to be entitled to common of pasture or herbage over the same tract of land for all their commonable cattle levant and couchant and swine bred upon their respective tenements all the year except for six weeks between Michaelmas Day and St. Martin's Day and (as to such of the defendants as had houses) to be entitled to common of estovers consisting of the right to have two loads of fuel in every year to burn for fuel in each of their houses then erected on their tenements respectively, and they proceeded to say "that they do not claim any other right or title of or into the forest or chase of *Ashdown*, other than for common of pasture and estovers according to the aforesaid custom." *John Day*, through whom the defendant to this action, *Bernard Hale*, derived his title, in his separate answer claimed to be seised of a freehold messuage and lands parcel of the manor of *Tarring Peverell* and of freehold lands holden of the manor of *Maresfield*, and of a copyhold tenement consisting of a messuage with forty acres of land called *Suntings* holden of the manor of *Maresfield*, and of certain other hereditaments outside the same manor in respect of which he claimed the right of common of pasture. And by the answer of *G. Nevill*, another of the defendants, in addition to the claim of common of pasture together with herbage, "liberty to dig and take in the said forest or park marle, earth, lome, sand, stone, brakes, fern, heath, and bushes, for the manuring, improving, maintaining, and mending the said premises and fences thereof" was also claimed.

By a decree made in December, 1691, Commissioners were appointed to set and lay out for the defendants sufficient common according to their respective rights and in convenient places; and it appearing to the Court that there was no wood ever esteemed or allowed for estovers but birch willow and alder only, it was ordered that the plaintiffs be at liberty to cut down and fell any sort of woods in the said forest, except only birch willow and alder, being the sorts of wood usually allowed the said defendants for estovers.

The commission thus ordered was executed, and the Commissioners, by their return, certified that they had agreed that 6400 acres of the forest would be sufficient common of pasture and herbage for the commoners and others claiming common on the forest, "so as the commoners enjoy the sole pasturage thereof, and the plaintiffs, owners and proprietors of the soil, be excluded from all right of pasturage either for sheep, horses, or other beasts, or any other cattle whatsoever therein." They also certified that they had laid out the said 6400 acres in the most convenient places, for the convenient and mutual intercourse between the said commoners. And that they had also set, appointed, and allotted certain parts of the said tract of land to the plaintiffs owners and proprietors of the soil, for their enclosure and improvement, and to be enjoyed by them in severalty, and the defendants and commoners claiming common in the said forest to be excluded and debarred from any common of pasture, herbage, or pannage therein. And as to the rest and residue of the forest lands, amounting to 6400 acres, the Commissioners had "left, set out, and allotted to remain and continue open and unenclosed for common of pasture and herbage for the defendants and their tenants and all others claiming common in the said forest, and they are to have the sole pasturage thereof to themselves, and the plaintiffs, owners and proprietors of the soil, are to be excluded and debarred from putting any sheep, horses, or other beasts, or any other cattle whatsoever thereon, or upon any part thereof." To this return was annexed a map "wherein are noted and distinguished y^e^ parts and shares allotted and appointed for y^e^ owners and Proprietors of y^e^ sayd Forrest and their assigns for their enclosure and improvement, and also y^e^ parts and shares for y^e^ Tenants Com̃onage and Pasturage of their Cattell, according to y^e^ directions of y^e^ sayd Com̃ission."

By the final decree made on the 3rd of July, 1693, by the Chancellor and Council of the (Duchy) Court by and with the advice of Sir *John Turton* and Sir *John Powell*, two of the Barons of the Court of Exchequer, the Judges Assistants of the Duchy Court, it was ordered that the return made and certified by the Commissioners and everything therein contained do stand ratified and confirmed by the order authority and decree of the Court, to be observed by all parties according to the true intent and meaning of the said return or certificate. "And that the said complainants their heirs and assigns, owners and proprietors of the soil of the said forest, shall from time to time for ever hold and enjoy all and every the parcels of land, tenements, and premises in and by the said certificate and return, or the map thereunto annexed, described, set forth, or allotted to be enclosed or improved by them; and that the said Defendants, and all persons claiming common in the said forest, shall for ever be excluded from having or claiming any common pasturage, pannage, or herbage within the said lands or tenements set out and allotted for the said plaintiffs as aforesaid; and that the said defendants, their heirs tenants and assigns, and all other persons having right of common in the said forest according to their respective interests therein, shall from time to time have and take the sole common pasturage and herbage of all and every the lands parcel of the said forest in and by the said return or certificate and map thereunto annexed allotted and left for common as aforesaid; and that the said complainants, their heirs and assigns, tenants and farmers, shall be for ever excluded from having or claiming any common of pasture or herbage upon or in the said lands so left for common as aforesaid."

Disputes having arisen as to the respective rights of the lord of the manor and the commoners over the common allotment, the Plaintiff, in 1877, as lord of the manor and owner in fee of the 6400 acres dealt with by the decree of 1693, brought the present action against *Bernard Hale,* who in right of his wife was possessed of the copyhold tenement known as *Suntings,* formerly belonging to *John Day,* a defendant to the suit of 1693, and against *John Miles,* who acted as the servant or agent of *Hale,* for the purpose of restraining the Defendants from cutting and carrying away brakes, fern, heather, and litter from the common allotment, and to obtain damages for the unlawful acts complained of.

The statement of claim alleged that *Hale* claimed a right of cutting and carrying away from the common allotment so much of the brakes, fern, heather, and litter growing there as might be sufficient for the manurage, improvement, maintenance, sustaining, repairing, and amending the said copyhold tenement, and had upon several occasions taken heather and litter growing on the said common allotment and used them on the said copyhold tenement for one or other but not for all of the said purposes—and in particular on the 13th of October, 1877, the Defendant *John Miles,* acting under the instructions and orders of the Defendant *Bernard Hale,* entered upon part of the said common allotment then in the

Plaintiff's possession under his title aforesaid, and cut down and carried away in waggons large quantities of heather and litter growing there,—— and thereby destroyed the cover for game, and also destroyed certain of the young fir trees and other trees growing there.

The Defendants, by their statement of defence, alleged that the 6400 acres were subject to the rights of common and other rights claimed by the Defendants, and that the right of the Plaintiff therein did not now extend to any heather or litter or herbage, or to any young seedling firs growing thereon, or to a franchise or franchises or to rights of chase, park, free-warren, sporting, or any other such rights or franchises over the 6400 acres, but that the Defendants and the other commoners were now entitled to the sole common pasturage and herbage, including the brakes, fern, heather, and litter growing in and upon the said land. The Defendants also, by par. 13, further alleged that "since the year 1693 the said *John Day* and the said other commoners, and their heirs, successors, and assigns, have had, taken, and enjoyed by themselves or their tenants in over and from the aforesaid 6400 acres the sole common pasturage and herbage, including the brakes, fern, heather, and litter growing in and upon the said 6400 acres. Their said rights have been recognised and respected by all owners or persons claiming to be owners of the soil of the said forest since the said decree, including the successive Earls *De la Warr*, until recently, when the present Earl, the Plaintiff in this action, for the first time disputed the same."

They also averred (par. 15) that "The said Defendant *B. Hale* and *Charlotte Cecilia* his wife and their predecessors in title, owners of the said tenement called *Suntings*, and the several occupiers of the same tenement, from time to time have actually taken and enjoyed as of right in respect of the said tenement, without interruption for the full periods of thirty years and sixty years respectively next preceding the commencement of this action, the right, profit, or benefit of cutting and carrying away brakes, fern, heather, and litter in and from the said 6400 acres, sufficient for the manurage, improvement, maintenance, sustaining, repairing, and amending the said tenement."

The Plaintiff delivered a reply by which he alleged that "the claim of the Defendant *B. Hale* in right of his wife to a share in the ownership of the brakes, fern, heather, and litter growing in the place where the Defendants committed the wrongful acts mentioned in the statement of claim is inconsistent with the claim of the same Defendant *B. Hale* in right of his wife to a prescriptive right of common or *profit à prendre* consisting of the right to take the brakes, fern, heather and litter growing in the place aforesaid for use upon the copyhold tenement mentioned in the statement of defence, and that the Defendants ought to rely either on the alleged right of ownership under the decree of the year 1693, or on the alleged right by prescription in the alternative, but not upon both these alleged rights at the same time in manner appearing in the amended statement of defence. And the Plaintiff says that the purposes for which the alleged prescriptive rights are claimed are so unlimited and uncertain and so destructive of the common allotment over which they are claimed, that they cannot properly be claimed under a prescriptive title."

The documentary evidence afforded a history of *Ashdown Forest* previously to the decree of 1693, as derived from the court rolls and other documents, including various inquisitions and returns from the year 1297 downwards. With respect to the period since the decree of 1693, various notices, records of meetings, and a great mass of correspondence, especially between 1800 and 1830, were adduced by the Defendants for the purpose of shewing the manner in which the claim to the right of cutting litter upon the forest had been asserted by the commoners and acquiesced in by successive owners of the soil down to 1875, when the dispute which gave rise to this action seems first to have arisen between Earl *De la Warr*, who succeeded to the title and property as owner in fee in 1871, and the Defendants. The effect of this evidence, and of the oral examination of the witnesses on behalf of the Plaintiff and of the Defendants, is given in the judgment of the Vice-Chancellor.

The action came on for trial before Vice-Chancellor *Bacon* on the 18th of February, 1880.

Sir *H. Jackson*, Q.C., and *Elton*, for the Plaintiff:—

The rights of the parties must be determined by the construction of the decree of 1693, which gave the Defendants common of pasture and herbage on the 6400 acres set apart for them—the words "common pasturage and herbage" being clearly equivalent to "common of pasturage and herbage." They are both terms perfectly well known to the law, are limited to that which can be taken by the bite of cattle, and do not, as the Defendants contend, include the right of cutting and carrying away brake and fern, which cattle do not and cannot eat. At Common Law "common of pasture" was a rather wider term than "common of herbage;" and "is a general term for herbage, acorns, mast, and nuts, and for leaves and flowers and all things comprised under the name of pannage (*de south le noun de pesson*). *Britton, Nichol's* Transl. (1). It is defined by *Bracton* as including everything which can be eaten. "*Est enim communia in eo quod dicitur pastura de omni quod edi potuit vel pasci, largè sumpto vocabulo vel strictè: largè, ut si quis habeat in alieno communiam pasturæ scil. herbagii, pessonæ, sive glandis sive nucis, et quicquid sub nomine pessonæ continetur: item foliorum et frondium strictè, scil. aliquod istorum unum vel duo.* Ib. § 2. *Item communia et non herbagium, ut jus falcandi herbam vel brueram vel hujusmodi ad rationabile estoverium*" (2). To the same effect is *Fleta* (3). And the interest of the commoner in the common being restricted to eating the grass with the mouth of his cattle, he must not meddle at all with the soil nor with its fruit or produce even though it may eventually improve and meliorate the common: *Roll.* Abr. (4); *Sir Simon de Harcourt's Case* (5); therefore he cannot cut the grass, wood, bushes, fern, or such things which do much impair the common: *Samborn* v. *Harilo* (6); nor can he cut the mole-hills, or make fishponds there: *Com.* Dig. Common (H); *Potter* v. *North* (7). And if the commoner cannot abate a nuisance, which goes to destroy totally the right of common, without interfering with the right of soil in the lord, he cannot pursue that remedy: *Kirby* v. *Sadgrove* (8). (See also the statute *Extenta Manerii* (9); and upon it *FitzHerbert*, Surveyenge (10): "Howbeit that a lorde may not improve himself of his waste grounds yet may he lawfully fall and sell all the wode, broom, gorse, fyrs, braken, ferne, bushes, thornes and such other, as freestone, lymestone, chalke, turves, claye, sande, lead, ore or tynne to his owne use, for the tenauntes may have nothinge by reason of common, but all onely bytte of mouthe with their cattel." "The statute speaketh *de herbagio villæ:* that is to be understand of the common pasture that belongeth to the town whereupon the herdeman keepeth the tenaunt's cattel"). The word "herbage" in the decree, therefore, does not extend the rights of the commoners to anything beyond what was given to them as "common of pasture." So far as it is not synonymous with pasturage, "herbage" has a more restricted sense, and being the technical term for that which cattle, as distinguished from deer and wild animals, would eat, would be correctly used in pleading such a right in a manor subject to the forest laws, and was therefore properly added in the decree of 1693, which dealt with the right of the lord and the commoners in what had formerly been the royal forest of *Ashdown.* This is shewn by the great *Charta Forestæ,* 9 Hen. III.: "*Et si boscum suum proprium afforestaverit remaneat foresta salvâ communâ de herbagio et aliis in eâdem forestâ illis qui prius eam habere consueverunt.*" In *Spelman's* Glossary, *herbagium* is defined as "*Vox forensica, vestura terræ quæ dentibus animalium decerpitur. Occurrit frequens pro jure depascendi alienum solum ut in forestis. Spelman* is followed in almost identical words in *Cowel's* Law Dictionary (1727): "*Herbage* (Fr.) Lat. *Herbagium* signifies the pasture or fruit of the earth, provided by nature for the bit or mouth of cattle, and it is commonly used for a liberty that a man hath to feed his cattle in another man's ground, *as in the forest;*" and also in *Skinner's* Etymologicon (1671), and *Jacob's* Law Dictionary (1729).

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(1) Vol. i. p. 371.
(2) Lib. iv. c. 38.
(3) Ibid. c. 19.
(4) Vol. i. p. 406, pt. 10, 12.
(5) 12 Hen. VIII. 2a.
(6) Bridgm. 10.
(7) 1 Wms. Saund. 350, 353a.
(8) 1 Bos. & P. 13.
(9) 4 Edw. I. stat. 1, cc. 5, 6.
(10) Pages 16, 17, 19.

In a royal forest it is impossible that the commoners, the Defendants' predecessors in title, would have been allowed to acquire any shadow of a right inconsistent with that which was the main object of the forest laws—the maintenance of adequate covert for the deer and game. Fern, brakes, heath, &c., are clearly included in the "vert" or "greenhewe" of the forest which was jealously protected for the benefit of the King's game. The rights of the commoners in a forest prior to disafforestation, are shewn by the resolutions of all the judges (1) on certain questions "moved between the Earl of *Nott.*, justice in eire in all the King's forests and the Earl of *Dorset*, Treasurer of *England*, concerning the disposing of the King's woods in his forests." The 5th resolution being: "He that hath the herbage or the pawnage of a parke by the grant or demise of the King or any other cannot take any herbage or pawnage but of surplusage over and above the competent and sufficient pasture and feeding of the game; and if the owner of the game suffer the game so to increase as there is no surplusage, then he that hath the herbage and pawnage cannot put any beasts in the parke:" Coke, 4 Inst. c. 73 [299]; Ib. [317]; thus shewing that all agriculture and everything else was at that time subordinate to the requirements of the game, and to the rights of vert and venison; and that in forests, or manors subject to the forest laws, *herbagium* did not include anything which was necessary for the delectation or preservation of the King's game [*Manwood's* Forest Law (2) was also referred to]. The rights of commoners in a royal forest being thus limited, it is further clear that no greater right could have been acquired between 1677, when the forest was disafforested, and 1693, when the decree was made.

We say that there is no ambiguity in the decree and that parol evidence is not admissible, nor is it indeed necessary, for the purpose of explaining its meaning. Such evidence, if it could be admitted, could be nothing but contemporaneous evidence, shewing the sense in which the particular expressions were used in 1693; *à fortiori* not evidence of what may have been done by individuals or by any class or body of persons many years after the document in question. Prior to the decree the evidence afforded by commissions and inquisitions shews conclusively that "herbage" and "common of pasture" were used as more or less convertible terms for that only which could be taken by the bite of cattle within the forest. The award and claims made in the suit of 1690, all have reference to the Inquisition and Articles in the time of *James* I., which use the word "herbage" throughout in a way which clearly shews that it was the customary term for common of pasture by bite of cattle in the forest, and the constant use of the words in these documents is evidently the reason why it was added in the decree. But, further, the Plaintiff relies on the fact that the answers of *John Day*, through whom the Defendant *Hale* claims title, and of the other Defendants in that suit who claimed "to be entitled to common of pasture or herbage over the same tract of land," expressly disclaim any right "other than for common of pasture and estovers according to the aforesaid custom." One claim and separate answer by the Defendant *Nevill* did raise the question of fern, &c., but was put aside and not referred to in the final return and decree.

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(1) Pasch. 5 Jac. 1.

(2) Cap. 17, pl. 2 (Ed. 1615), p. 209 (Ed. 1741).

Throughout the whole history of the forest, fern is shewn to have been dealt with as a thing quite apart from herbage or pasture; its improper use being made the subject of presentment and amerciament. Instances of this are found in the extracts from Duchy of *Lancaster* Records, Class III., *Henry* VIII. (1) (being a presentment by the rangers of wrongs done by the tenants): "Also they fell brakes and hethe, and dig stone at their libertie without assignment of any of the foresters, which is contrary to their custom"; so at a Woodmote Court of *Duddleswell Manor* (Dec. 3, 1616) *T. Humfrey* is amerced for cutting down within the forest and carrying thence "dumos, Anglice brakes."

But assuming, on the other hand, that evidence of modern user is admissible, the Plaintiff can shew a uniform, continuous, and uninterrupted series of acts of ownership by himself and his predecessors in title, proving conclusively that the successive owners of the soil have, as of right, dealt with this bracken fern and litter as their own property. In point of fact, so far as any one else has cut, the truth is not that the commoners have exercised this right of cutting bracken and fern for themselves, but that any vagabond, gipsy, or tramp in the neighbourhood has, as a mere trespasser, gone in and cut waggon loads of fern, necessarily taking young seedling firs, &c., at the same time, and sold it to anybody who thought fit to buy it, without asking whether the buyers had or claimed common rights or no, so that the waste has been subject, not to the exercise of anything which fairly looked at would be an assertion of title, even under the decree of 1693,

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(1) Vol. 35, R. 7, n.

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but to a long-continued series of most wanton depredations; and the utmost that can be imputed to the successive owners of the soil is more or less abstention from the prosecution of pilferers, in no way excluding themselves or their successors from the enjoyment of their legitimate rights.

The Defendants' claim in this action, being a claim to a *profit à prendre* (not made by copyholders) is bad in law and incapable of being established by custom, however ancient, uniform, and clear the exercise of that custom may have been; nor can it be claimed by prescription: *Attorney-General* v. *Mathias* (1); *Blewett* v. *Tregonning* (2). From *Gateward's Case* (3), which still stands forth as a landmark of the law on this subject (see *Attorney-General* v. *Mathias* (4)), down to *Chilton* v. *Corporation of London* (5), the authorities are uniform that such a custom is bad in law and cannot exist: *Lord Rivers* v. *Adams* (6). And further, the absence of any mention in the customaries or records of any such custom as that asserted by the Defendants negatives it conclusively: *Duke of Portland* v. *Hill* (7). And as there can be no such *profit à prendre* by way of custom (*Attorney-General* v. *Mathias*), still less can this alleged right be established by prescription, or a grant be presumed, in favour of an indefinite number of persons not constituting any kind of class known to the law nor united by any feudal or other nexus, whose exercise of it would be without stint or limit, and who might thereby destroy the whole subject-matter out of which it is to arise: *Race* v. *Ward* (8); *Chilton* v. *Corporation of London*; (explaining *Willingale* v. *Maitland* (9)).

Then as to the individual claim by prescription which is alternatively set up by the Defendant *Hale* in respect of his particular tenement, this as we say is absolutely inconsistent with the claim founded on the decree, and is badly pleaded: *Dowglass* v. *Kendall* (10). Such a claim must be strictly proved by evidence

(1) 4 K. & J. 579, 590. 4 Jur NS 629
(2) 3 Ad. & E. 554.
(3) 6 Rep. 59, b.
(4) 4 K. & J. p. 591. 4 Jur NS 630.
(5) 7 Ch. D. 735.
(6) 3 Ex. D. 361, 364.
(7) Law Rep. 2 Eq. 765.
(8) 4 E. & B. 702. 1 Jur 704
(9) Law Rep. 3 Eq. 103, 109.
(10) Brownl. 219; Cro. Jac. 256, 1 Buls. 93.

of such usage as will imply the making and losing of an ancient grant before the time of legal memory: *Blewett* v. *Tregonning* (1); *Lord Pelham* v. *Pickersgill* (2); and the Plaintiff is entitled to rebut it by shewing either that there never could have been any such origin to the supposed grant as that on which the old law of prescription was based, or that the prescription was in its nature illegal and impossible. Not only is there no proof in support of such a prescriptive right, but there is an actual disclaimer on record, in the proceedings of 1689–93 by *John Day*, the owner of the tenement in respect of which Mr. and Mrs. *Hale* claim. Moreover, the Defendant has not connected the user on which he relies with the prescriptive right which he claims alternatively in respect of his particular tenement; and evidence of user which has taken place under a mistaken view of the decree and award of 1693 cannot, when the case upon the decree put forward by the Defendant fails, be called in aid of the prescriptive claim: *Lord Rivers* v. *Adams* (3); *Campbell* v. *Wilson* (4). A prescription to be good must be both reasonable and certain, and the claim cannot be supported if the right prescribed for is, as in this case, too wide, unreasonable, or contrary to law, or if the required presumption is inconsistent with the past and existing state of things: *Lord Rivers* v. *Adams*; *Lord Pelham* v. *Pickersgill.* Can it be supposed that there would ever have been a grant to the owner of a particular tenement in a royal forest, of an unlimited right to take as much as he might require from the land, without let, stint, or hindrance, for manuring and improving, his tenement? Any such privilege would be bad in law as being indefinite and uncertain, and destructive of the whole subject-matter over which it was to be exercised: *Lady Wilson* v. *Willes* (5); and is also incapable of being sustained as appurtenant or as an incident which can be annexed by law to the ownership or to the occupation of the particular tenement in respect of which the Defendant claims to prescribe: *Bailey* v. *Stephens* (6). It is therefore not only bad as being too indefinite and uncertain, but it is also obviously bad as being inconsistent with the proved and admitted state of facts at the time of the decree of 1693 and long before; and it would have been impossible, and therefore not legal, to attribute to any King of *England* that he had at any time granted a prescriptive right which was in fact destructive of the whole scheme of the royal enjoyment and occupation of the forest.

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(1) 3 Ad. & E. 554.
(2) 1 T. R. 660.
(3) 3 Ex. D. 361, 370–371.
(4) 3 East, 294.
(5) 7 East, 121.
(6) 12 C. B. (N.S.) 91.

Joshua Williams, Q.C., Sir *William Harcourt*, Q.C., *R. E. Webster*, Q.C., and *P. H. Lawrence*, for the Defendants:—

The Defendants, to whom as commoners this tract of 6400 acres in the forest was set apart as their exclusive pasturage by the solemn decree of 1693, are entitled to preserve their pasture from being diminished and becoming a mere pine forest for the benefit of the lord, and are not limited in their right to so much only as can be taken by the bite of their cattle. It is said that the right we claim is inconsistent with the great object of the forest laws, which were the maintenance of adequate cover and protection for the King's deer; and *Bracton*, *Britton*, and *Fleta* have been cited for the purpose of shewing that "pasturage" is limited to whatever can be eaten or taken by the bite or mouth of cattle. But by all these authorities the right of cutting or mowing in the forest, *jus secandi vel falcandi in forestâ vel bosco alicujus*, for his reasonable estovers for building, fencing, burning, and other things which are necessary, *secundum constitutionem servitutis in plus vel minus* is treated as of ordinary occurrence: *Bracton* (1). The passage which has been cited from the Charta Forestæ (2) "*salvâ communâ de herbagio et aliis in eâdem forestâ illis qui prius eam habere consueverunt*," when taken in connection with the *contemporanea expositio* of *Bracton*, shews that the common of pasture and other rights which were excepted were intended to include such rights as are set down by *Bracton*. To the same effect as *Bracton*, and almost in the same words, are *Britton* (3); *Fleta* (4). Moreover, we contend that this right improves, and does not destroy the "vert." So much for the argument that, according to the forest laws, when they were in full vigour, there could only be the right to take herbage by the mouth of cattle, and that the existence of the right of cutting fodder and litter, inasmuch as it would destroy the "vert" and covert for the deer, was impossible.

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(1) Lib. iv. cap. 41.

(2) 19 Hen. III.

(3) Vol. i. p. 395 (*Nichol's* Transl.).

(4) Lib. iv. cap. 25.

II. It is objected that the Defendant's claim is altogether too wide to be allowed: (*a*) from its uncertainty; (*b*) from its tendency to destroy the whole value of the soil out of which it issues; and further, that there can be no custom to have common in a *profit à prendre*. But *Viner*, Abridg. (1) says: "*Libertas falcandi* is a profit apprender, but a man is not thereby tenant or occupier, nor can prescribe to be discharged of tithes as such,"—citing *Suckerman* v. *Warner* (2), in which case the *jus falcandi* on the land of another person was recognised as a prescriptive right which a man might plead. In quite recent times, rights very difficult to distinguish from the right which the Defendants claim, have been asserted and established by the decree of the Court of Chancery: *Smith* v. *Earl Brownlow* (3), in which case the decree declared the plaintiffs to be entitled "to a right of common of pasture and to a right of pannage and to a right to cut so much furze, gorse, and underwood upon the said common" and unenclosed waste "as may be required for the purpose of fodder and litter for all commonable cattle and swine *levant and couchant*, and their tenements, and for fuel and other purposes of agriculture and husbandry necessary for the beneficial and profitable enjoyment and use of their tenements." In *Warrick* v. *Queen's College, Oxford* (4), was also established this right of the commoners to all fern, &c., for the purposes of agriculture and husbandry—a right which is obnoxious to all the remarks made here, that as a farmer never has enough manure it must perforce be too wide a claim, and that it cannot be a proper prescriptive claim because it tends to the destruction of the soil out of which it issues. So much for the objection that the claim of the Defendants is too wide.

III. It was objected, on the authority of *Sir Simon de Harcourt's Case* (5), that a commoner can in no case meddle with the soil, but can only take the grass by the mouth of his cattle. But in

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(1) Tit. *Profit Apprender* 7.

(2) 2 Buls. 248.

(3) Law Rep. 9 Eq. 241.

(4) Law Rep. 10 Eq. 105; Ibid. 6 Ch. 716.

(5) 12 Hen. VIII. 2; 13 Hen. VIII. 15 D.; 36 Hen. VIII. 36 b, 39.

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Vin. Abr. Commoner (A.), 10m, it is stated that "that was demurred and not adjudged," and cases are there cited that there may be a right, if used time out of mind, for the commoners to dig the land to let out the water (as in the moors in *Somersetshire*), which prejudices their common. So also *Comyns*' Dig. Common (H.) says that the commoner, who has no interest in this soil, "cannot cut down bushes, fern, &c. without special custom; though they prejudice his common"—thus implying that he may be authorized to do so by special custom: *Cruise*, Dig. (1); and that there may be this right is shewn incidentally by *Woadson* v. *Nawton* (2). The right of taking pasture by mouth of cattle may, by custom, which has been time out of mind, extend to cutting down branches of the oaks for the cattle in the time of a great snow: *Vin.* Abr. Custom (E.) 12 (citing Year Book, 46 Edw. 3) (3), and by special prescription the cutting of bushes may be justified: *Woolrych*, Commons (4). In *Beau* v. *Bloom* (5) the right to take and cut the bushes as litter for the cattle was recognised as a reasonable and useful part of the right of common of pasture, the two being taken and considered as one united right.

IV. It was objected, on the authority of *Duke of Portland* v. *Hill* (6), that the omission in the customary of any mention of the particular right claimed is conclusive evidence against the existence of such a right. But in the presentment of the 10th of October, 1520, it is presented that the King's tenants "shall have frith and tenante within the forest for closes of their land that be within the said forest by deliverance of the forester. Also marle for mendynge of their lands, paying for every hundred of marle ij.d. Also to have hethe within the said forest to thatch their houses, also lome to dobe owre walls, stone to underpyne our houses, *and fern to mend our lande*, and all this without interdiction."

This is an actual statement in short terms of a right in the tenants tantamount to that which we claim; and the Court Rolls afford negative evidence in support of our claim. In the long list of offences by customary tenants which are to be inquired into, *e.g.*, "Whether any have unlawfully felled, cut down, or

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(1) Vol. iii. p. 75.
(1) Str. 777.
(3) 12 B.
(4) Page 195.
(5) 3 Wils. 456; 2 W. Bl. 926.
(6) Law Rep. 2 Eq. 765.

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taken or carried away any wood, timber, trees, or holmes" (19th January, 1668), there is nothing about cutting fern being an unlawful act, thus shewing conversely, on the principle of *Duke of Portland* v. *Hill* (1), that cutting fern could not have been an offence at all. Then the Plaintiff relies upon the presentment of the 3rd of December, 1616, and amercement of some one for cutting "*dumos* Angl. brakes," and it is argued that *dumos* means fern or bracken. But *dumus*="a bush, all kind of thorns, briars, or brambles, a grove"—*Ainsworth;* and we say that the man was presented and amerced for cutting thorns or briars, not for cutting fern. Although "brake" also means bracken or fern, the primary sense of the word is "a thicket of brambles or thorns"—*Latham* English Dictionary, 1866; and that this was the meaning in common use in 1616 is shewn by '*Midsummer Night's Dream,*' act iii. sc. 1: "This hawthorn brake our tyring-house." And the use of the same word "*dumos*" (Angl. "holmes") in the presentment of the 6th of December, 1620, where holmes (*i.e.*, holly-bushes) cannot possibly mean fern, affords evidence that "*dumos*, Angl. brakes" in the former entry, meant bushes or brambles, not fern.

As to the effect of the decree of 1693, the ordinary interest of the lord in the waste in the case of inclosure, 1. as owner of the soil, 2. as chief commoner, is shewn by *Arundell* v. *Viscount Falmouth* (2); *Lloyd* v. *Earl Powis* (3); *Musgrave* v. *Inclosure Commissioners* (4). By that decree the lord is totally excluded from all right of pasture over the 6400 acres set apart for the commoners, his sole interest being limited to timber, stones, mines, and other matters which belong to him as owner of the soil. The effect of the decree, therefore, has been to turn that which was before a right of common into a *separalis pastura*, excluding the owner of the soil from feeding there: *Co. Litt.* (5); *Johnson* v. *Barnes* (6); *Potter* v. *North* (7); *Hoskins* v. *Robins* (8), in which cases it was adjudged that a custom for the tenants of a manor to have a sole and separate pasture in exclusion of the lord was good. With respect to the legal meaning of *herbagium*, although *Spelman* and his copiers describe it as "*vestura terræ quæ dentibus animalium decerpitur*," there are other meanings of the word which they have omitted to give. *Du Cange*, "*Gloss. Mediæ et infimæ Latinitatis*," defines it as "*Herba in pratis succisa*," and also "*jus seu facultas succidendi ejusmodi herbas in pratis aut in communiis, vel etiam in silvis, aut animalia in eis pascendi.*" So, also, *Co. Litt.* (1), under a grant of *vestura terræ*:—"the land itself shall not pass because he hath a particular right in the land; for thereby he shall not have the houses, timber trees, mines, and other real things parcel of the inheritance, but he shall have the vesture of the land, (that is) the corn, grass, underwood, sweepage, and the like, and he shall have an action of trespass *quare clausum fregit.* The same law if a man grant *herbagium terræ*, he hath a like particular right in the lands, and shall have an action *quare clausum fregit*": *Shep.* Touchst. (2); *Vin.* Abr., Herbage (A); *Co. Litt.* (3) (that the herbage or vesture of land may be granted by copy); *Dyer* (4), that the grantee of the King *de herbagio foresti* shall have trespass against any one who consumes or destroys the grass, and the right of trespass shall be *quare clausum fregit* "as well as if it was of land," and also that "he which claims *vesturam terræ* or *herbagium terræ* may mow and cut down the grass and underwood, and bring trespass *quare clausum fregit*, having a greater interest than those which claim sole and separate pasture, for they have only the taking of the grass and pasturing their cattle" (see also *Pollexfen's* argument in *Hoskins* v. *Robins* (5)); all these authorities being inconsistent with the notion that "herbage" includes only that which may be consumed by mouth of cattle. Under a right of several pasture, which is a larger right than a mere right of common, the lord may be excluded from digging his own soil or gravel to the injury of the right of pasture: *Robinson* v. *Duleep Singh* (6); and also from bringing trespass in respect of injury to the surface as distinguished from the subsoil: *Cox* v.

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(1) Law Rep. 2 Eq. 765.

(2) 2 M. & S. 440.

(3) 4 E. & B. 485. 1 Jur. N.S. 240

(4) Law Rep. 9 Q. B. 162.

(5) 122 a.

(6) Law Rep. 7 C. P. 592; Ibid. 8 C. P. 527.

(7) 1 Wms. Saund. 350–3, n. (2); 1 Ventr. 383.

(8) 2 Wms. Saund. 323; S. C. 2 Lev. 2; Pollexf. 13; 1 Mod. 74; 1 Ventr. 123, 163; 2 Keb. 757, 842.

(1) 4 b.
(2) Page 97.
(3) 58 b.
(4) 285 B. pl. 40.
(5) Pollexf. 13.
(6) 11 Ch. D. 798.

Glue (1). With respect to the argument that herbage cannot include fern or heather, as cattle will not eat them, this argument is displaced by common experience, as cattle, especially in the Highlands, do eat fern and heather, and did so long before the decree of 1691.

> "When they far'd best, they fed on fern and brack,
> Their lean shrunk bellies cleav'd up to their back."—*Drayton*, Mooncalf.

It is absurd, therefore, to say that "herbage" cannot include brakes, gorse, and heather, or that it is confined, either in botany or in law, to that which is strictly edible.

The decree of 1693 gives the Defendants the sole common, the sole pasturage, and the sole herbage of the 6400 acres by proper technical words, which, according to *Co. Litt.* (2), give them the "sweepage," *i.e.*, all that comes in the sweep of the scythe; and, though not land, what is so given is a tenement in respect of which, on the authorities already cited, they may bring an action of trespass *quare clausum fregit.* We ask the Court to read the decree without any alteration, *i.e.*, "common (as a noun substantive), pasturage, and herbage," and without interpolating, as the Plaintiff seeks to do, "of" between "common" and "pasturage." In addition to the sole pasturage and sole herbage, the Defendants will then be entitled to the fern and litter as estovers under the word "common," and generally to whatever rights of common they can prove to exist, and by custom to have been exercised from time immemorial. By the Plaintiff's construction all rights in the commoners but that of common of pasture are ignored. Up to the time of the decree, however, we shew, by the court-rolls and records, that rights of estover had been exercised by the commoners over the whole forest. The effect of the decree was completely to change the relations between the lord and the tenants, and to sanction and confirm a sort of judicial bargain under which more than half the waste was allotted to the lord discharged of all rights of common whatever, which could only be done by consent of the commoners: *Coke* (3); while as to the remaining 6400 acres, the commoners were left in the fullest exercise of all their rights of common, and the lord by his own consent was distinctly excluded from all rights, except his inherent rights as owner of the soil. On the present pleadings the Plaintiff has no case. He has no right to the heather and litter, which are estovers to which the Defendants are entitled as "common"—otherwise there is nothing whatever in the decree to include the undoubted and admitted right to common of estovers of birch, willow, and alder—and he cannot bring an action unless his soil is disturbed by the commoners in the exercise of their rights, which is not charged, or unless the young trees are destroyed, which, though charged, is not proved.

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(1) 5 C. B. 533.

(2) 4 b.

(3) 2 Inst. cap. iv. [87].

Next we say that the meaning of the word "common" is to be ascertained by what has taken place from time immemorial with regard to the lands subject to this decree, provided the user be of a kind not contrary to law, which it has been shewn not to be: *Smith* v. *Earl Brownlow* (1); *Warrick* v. *Queen's College, Oxford* (2). We shew that from time immemorial, and especially from 1693 down to 1875, there has been a constant, uniform, and uninterrupted exercise by the commoners of this right, which they now assert, of cutting fern and litter for the general purposes of husbandry, and for the improvement of their tenements, as well as of taking the herbage by the mouth of their cattle. It is objected that evidence of modern usage and custom cannot be admitted to interpret an ancient grant or charter. But such evidence is not only admissible, but most relevant; and in the construction both of ancient charters and of private deeds, expressed in obscure or general terms, oral evidence has always been admitted to prove the continual and immemorial user under the instrument: *Taylor* on Evidence (3); *Roscoe* on Evidence (4). Accordingly the meaning of words in ancient grants, court-rolls, or deeds may be enlarged or restricted from their natural meaning, so as to correspond with what has been the constant continuous modern user: *Duke of Beaufort* v. *Swansea Corporation* (5); *Calmady* v. *Rowe* (6); *Pilots of Newcastle* v. *Bradley* (7); *Stammers* v. *Dixon* (8). In this case custom is the true key for the interpretation of any ambiguity in the decree, and by custom the right of cutting fern, heather, and litter, either as "common" (*i.e.*, common of estovers) under the decree, or as part of the right of pasture or of herbage, has been immemorially asserted and exercised by the customary tenants.

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(1) Law Rep. 9 Eq. 241.

(2) Law Rep. 10 Eq. 105; Ibid. 6 Ch. 716.

(3) 7th Ed. vol. ii. p. 1006. 6Ed /1044

(4) 14th Ed. p. 29.

(5) 3 Ex. 413.

(6) 6 C. B. 861.

(7) 2 E. & B. 428, n.

(8) 7 East, 200.

Not only has there been an uninterrupted exercise of this right by the tenants, but there have been solemn and important recognitions and admissions, on which we rely, of our right by the lord, by his stewards, and by his legal advisers from time to time, and more especially in 1808, 1811, 1816, 1830–3, and 1871. On the other hand, from 1729 until 1875 no act of ownership by the lord inconsistent with our claim has been proved. The form of appointment of steward of the manor "to take care of all timber, tellers, and holly standing and being on the estates, to remove and break down all encroachments, and generally to guard and defend our rights and interests in the soil of the wastes within the said manors, and attend to the management and letting of all quarries, mines, and minerals on or under the same, and to recover and collect for our use all rents and dues arising therefrom," negatives any such right as is now asserted by the Plaintiff.

[Reference was made to the documents containing the proceedings at meetings of the commoners, and, *inter alia*, to the regulation by the customary tenants of the homage in 1809 of the right to cut brakes, heath, and heather (and *Commissioners of Sewers* v. *Glasse* (1) was referred to as deciding that the lord of the manor, with consent of his copyholders, can only bind his own tenants, and cannot bind other persons having, by virtue of a forest right, a right of common over the same lands); to the resolutions passed at a meeting in May, 1830, at which a former Lord *De la Warr* was present, that persons in possession of estates entitled to rights of common "are entitled to common of pasture for the cattle kept by them, to take birch, willow, and alder for estovers as specified in the proceedings of 1691, and that they are further entitled by custom to common of herbary, and to take litter to be used on the same estates;" and also to the statement in the particulars of sale, when *Hale's* predecessors in title bought the property, of the right of litter as an important increase of value to the property.]

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(1) Law Rep. 19 Eq. 134, 162.

Next as to the claim by the Defendant *Hale* of a prescriptive right in respect of his tenement. It is contended on behalf of the Plaintiff that the evidence of user under the decree of 1693 cannot be used as evidence of user under the *Prescription Act*, 2 & 3 Will. 4, c. 71. But in proving a prescriptive right under the Act evidence may be given of a larger right than that which is put in issue, and the larger right will support the smaller claim, though evidence cannot be given of a different and distinct right: *Wms. Saund.* (1); *Roscoe* on Evidence (2); *Bailiffs of Tewkesbury* v. *Bricknell* (3). In *Lord Rivers* v. *Adams* (4) the user by the inhabitants of a parish generally, of which evidence was given, was incompatible with the prescriptive right claimed in respect of a particular house. Here the rights are of the same kind, though one is larger and more beneficial than the other. Although such a profit *à prendre in alieno solo* cannot be claimed by custom: *Blewett* v. *Tregonning* (5); a man may prescribe for such a claim, and the claim may be regulated, enlarged, or lessened by custom: *Warrick* v. *Queen's College, Oxford* (6); *Grimstead* v. *Marlowe* (7) (which, so far from overruling *Beau* v. *Bloom* (8), confirms it in every respect). *Lady Wilson* v. *Willes* (9) only shews that a custom to cut and take the turf of a common is bad, because it tends to the destruction of the grass, whereas here the pasture is improved by cutting down things that cattle cannot eat. *Beau* v. *Bloom* is especially relied on as shewing that a customary usage may legally enlarge or add new or unusual incidents to an ordinary prescriptive claim, and may therefore annex to an ordinary right of common by bite of cattle a further right of mowing the herbage and taking it away.

To sum up our argument:—Under the construction of the decree of 1693 the Defendants are entitled to sole pasture and sole herbage, and that being so, the lord has no right to the herbage, and cannot bring this action. Constant user may be called in aid in the construction of a decree, and the decree sets out this portion of land as common for the tenants. The sort of common that the tenants may have is proved by the immemorial exercise of rights of common in this portion of land. It is a right of estovers, which, being established by immemorial usage, comes under the description of right of common for the purpose of which this decree is set out. Then if the decree contains any ambiguity, it may be set right by immemorial user. The lord has not proved by the slightest evidence any act of ownership for more than 150 years, whereas, not only in respect of *Hale's* tenement, but in respect of forty other tenements, there has been a constant, uniform, uninterrupted exercise of this right of taking litter, from as far back as human memory reaches, down to the present time. We then rely on the fact that in 1818 Mr. *Hale's* property was bought, with the right of litter set forth in the particulars of sale as an important increase of value to the property; and, as evidence, on the different admissions made by the different lords of the manor of this right in 1808, 1816, 1830, and 1871–3. We rely upon these, not as estoppels in the strict legal sense of the word, but as important evidence in our favour.

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(1) Vol. i. p. 269 (k).
(2) Page 763.
(3) 1 Taunt. 142.
(4) 3 Ex. D. 361.
(5) 3 Ad. & E. 554.
(6) Law Rep. 6 Ch. 716.
(7) 4 T. R. 717.
(8) 3 Wils. 456.
(9) 7 East, 121.

Sir *H. Jackson*, in reply:—

The real question is, what is the true construction of the decree of 1693? We say that we are seised of the soil and all the rights belonging thereto, subject to "sole common pasturage and herbage" in the 6400 acres set apart for the commoners. Is, then, the word "common" a noun substantive, and does it include something more than pasturage and herbage, or is it, as we contend, an adjective, so that the expression is tantamount to "the sole common of pasturage and herbage"? The construction we put upon the words is supported by the Return of the Commissioners, of which the decree of 1693, in its declaratory part, with the inadvertent omission of the word "of" before "pasturage," is a verbatim copy; and that the omission was accidental is confirmed by the subsequent part of the decree, in which the owners of the soil are excluded from "common of pasture or herbage upon or in the lands so left for common as aforesaid."

As to the meaning of the word "herbage": *Du Cange* is not a writer on English law, and whatever definition he may give from the Customs of *Normandy*, it is certain that by that custom "herbage" did not include a commonable *jus secandi*, but was confined to something of the same sort as corn and other fruits of the soil: "*Ne peuvent justicier ou prendre namps que sur leur fief, ne poursuivre personne qui ne tiennent d'eux, s'ils ne les trouvent en leur fief en present mesfaict, comme au dommage de leurs bleds, herbages, ou autres fruits, ou s'ils n'emportent leur panage, ou autre chose desdits seigneurs ; car de ce doivent-ils payer et amender aux uz et coustumes des villes, des marchez, des foires et des panages*": *Nouveau Coutumier Général*, 1724, Tom. iv. p. 61. *Coutume de Normandie*, Art. 30. We have gone through the citations given in *Du Cange*, and not one of those in which "*Herbagium*" means "*jus secandi*" has any relation to *England*. The passages cited from *Co. Litt.* (1) and *Sheppard's* Touchstone (2) only shew that *vestura terræ*, which is distinguished from *herbagium*, is somewhat wider in meaning than "pasture," and it is clear that a grant of "pasture" includes "herbage," and that the two words are practically equivalent; and also that a grant of *herbagium* is not a grant of the soil: *Co. Litt.* (3), *Cox* v. *Glue* (4); though the owner of such a right may protect himself by action of trespass: *Dyer* (5); *Robinson* v. *Duleep Singh* (6). The passage from *Co. Litt.*, if read with the context, does not support the Defendants' contention at all. The Defendants have claimed the right to adduce parol evidence of what has been done under the decree to explain its construction, but the cases cited in *Taylor* on Evidence (7) shew that, as the necessary condition for allowing evidence of contemporaneous and continuous user to explain the construction of an ancient document, there must be some obvious ambiguity admitting of more than one interpretation, or the document must be unintelligible without the aid of the proposed evidence. Here there is no ambiguity, no words which can be said to be unintelligible without the aid of explanatory evidence. *Doe* v. *Beviss* (8) was also referred to on this point.

But, if admissible at all, such evidence must be uniform and

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(1) 4 b.

(2) Page 97.

(3) 47 a, 58 b.

(4) 5 C. B. 533, 538, 548.

(5) Page 285 b.

(6) 11 Ch. D. 798.

(7) 7th Ed. vol. ii. § 1205, p. 100 b / 9 Ed 844

(8) 7 C. B. 456.

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continuous, and here it is neither one nor the other, while the documentary evidence is altogether inconsistent with any one uniform and continuous exercise of the right claimed by the Defendants. As to the alleged custom to take litter, we admit that a copyholder may allege a custom over the waste of the manor which, though the lord's land, is subject to the custom; but we say that with this exception a custom to take a profit in the land of another is a bad custom and void. This is disputed by the Defendants, and *Beau* v. *Bloom* (1) was cited to shew that a custom to cut and carry away rushes as annexed to or part of a right of common might be set up. But *Beau* v. *Bloom* has been in effect overruled by *Grimstead* v. *Marlowe* (2), deciding in accordance with *Gateward's Case* (3) that such a *profit à prendre* in another's soil cannot be claimed by custom, but that "the party must prescribe in a *que* estate"; and at all events *Beau* v. *Bloom*, whether overruled or not, only shews that such a right, if proved, might be good, whereas in this case the right claimed, whether by custom or by prescription has not been proved. In the case cited by *Viner* from the Year Book, 46 Edw. III. c. 12, B. Tit. Trespass, the bailiff had, with the assent and accord of his master, given leave to the agistor to cut the branches: "*que del assent et accord de son maister le baill' graunt' de prend' branches,*" and the decision went on that agreement and license. *Smith* v. *Earl Brownlow* (4) and *Warrick* v. *Queen's College, Oxford* (5), have also been relied on as establishing the right of commoners to cut fern and gorse. In these cases the exercise of the special right on the part of the freeholders of the manor, who were represented by the Plaintiffs, was abundantly proved by the evidence of the Court Rolls, extending over 200 years, and the parties who, as freehold tenants of the manor, prescribed in respect of their common right, were connected by that feudal nexus. Here the only connection is that the Defendants are within the purview of the same decree under which alone the user on which they rely can have taken place. But a right founded on a decree cannot be claimed by prescription, and the user, if shewn to have been in fact under the decree, cannot be relied on as the foundation for presuming a grant: *Lord Rivers* v. *Adams* (1) (citing *Campbell* v. *Wilson* (2)). As to the alternative claim by prescription in respect of Mr. and Mrs. *Hale's* tenement: either *Hale* represents himself only, in which case his claim fails for want of sufficient proof; or he represents an undefined class for an unlimited time, a claim which is not within the *Prescription Act*, and cannot be supported: *Blewett* v. *Tregonning* (3).

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(1) 3 Wils. 456; 2 W. Bl. 926.

(2) 4 T. R. 717.

(3) 6 Rep. 59, b.

(4) Law Rep. 9 Eq. 241.

(5) Law Rep. 10 Eq. 105; Ibid. 6 Ch. 716.

As to estovers, which are all one with botes: *Heydon and Smith's Case* (4) (see also *Blackst.* Comm. (5)); the decree of 1693 did in effect dispose of the question as it gave the Defendants no rights beyond those of pasture and herbage in common over the 6400 acres. In conclusion, we submit that the Defendants have entirely failed to establish this right which they claim, either upon the construction of the decree of 1693, or by custom or by prescription; and the Plaintiff is therefore entitled to restrain the Defendant from any further commission of the wrongful acts complained of.

April 14. BACON, V.C., after stating the case and referring at length to the proceedings in the suit of 1691–3, continued:—

The history of the claims made by the commoners of such rights as they possessed while *Ashdown* was a Royal forest, is to a considerable extent furnished by the documents admitted and referred to in the pleadings and arguments, but at no period of that history, nor in any of the documents, is to be found a trace of a claim of right by the commoners to cut and carry away pasture or herbage or brakes, heather, or litter. On the contrary, there is more than negative evidence that no such right was ever claimed or lawfully exercised. The present Defendants allege in their answer (paragraph 6) a grant by letters patent dated in 1546 from *Henry* VIII. to Sir *John Gage*, of the manor of *Maresfield*, which is one of the manors in respect of which common over 6400 acres was allotted by the decree of 1693. By those letters patent there was also

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(1) 3 Ex. D. 361, 371.

(2) 3 East, 294.

(3) 3 Ad. & E. 554.

(4) 13 Rep. 67.

(5) Vol. ii. p. 35.

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granted to Sir *John Gage* and his tenants sufficient common pasture and pannage within the Forest and Chase of *Ashdown*, at every time of the year for all and all manner of cattle, pigs, sheep of two years old (*bidentes*), goats, and other animals, to nourish and be nourished in as ample manner and form as the tenants, farmers, and occupiers of the manor at any time within the space of thirty years next preceding had had and enjoyed the same. The terms of this grant shew that the purpose and object of it was to provide for the nourishment of the beasts there mentioned. It appears from numerous documents which have been referred to that from very early times questions had arisen relating to the forest. Several inquisitions were directed in the reign of *Henry* VIII., one of which, the 12th of July, 1519, reciting that great waste and destruction of wood, and other offences were committed and done within the Royal forest, directed Courts to be holden to which were to be summoned the tenants or farmers claiming anything within the forest, and to shew by what title or evidence they claimed, at which Courts the Commissioners were to examine such evidence as any person should make for his claim. There is no evidence of any return made to this inquisition, but there is a presentment by the King's customary tenants, the 10th of October, 1520, in which they present that "the Kynge's tenantes shall have frith and tenante within the forest for closing of their lands that be within the said forest, by the deliverance of the forester, and also marle for mending of their lands, paying for every hundred of marle ij*d.*, also to have heath within the said forest to thatch their houses, also lome to dobe owre walls, stone to underpinne owre houses, and 'verne' (fern) to mend our land, and all this without interdiction." And a claim in the same terms is stated in a presentment appearing to be dated the 1st of March, 1545, and therein the tenants further claim "by the tenure of our custom wainbote and ploughbote, that is to say, of beech, birch, or alder."

As far, therefore, as such evidence as the Court Rolls present up to the end of the reign of *Henry* VIII., it appears that the customary tenants claimed to be entitled to wood by the assignment of the forester, to marle upon payment of the sum mentioned, to heath to thatch their houses, loam to daub their walls, stone to underpin their houses, and fern to mend their lands. But there is no recognition or evidence of the allowance of these claims or of its exercise without interference on the part of the Crown. There is, however, some evidence to the contrary, for by a presentment of wrongs done as concerning the tenants of the *Forest of Ashdown* by the ranger and forester of the same, made in 1545 (the same year in which the grant of common, pasture, and pannage was made to Sir *John Gage*), it is presented that the tenants "fell thorns and beech to enclose their lands without any appointment of any of the foresters, which is contrary to their custom; the thorns in some places being a great safeguard for the deer; also they fell brakes and heath and dig stone at their liberty without assignment of any of the foresters, which is contrary to their custom."

In 1610 (8 Jac. I.) a Royal Commission was issued to inquire as well by oath-evidence, as by perambulation and examination of witnesses upon their oaths of the several articles thereto annexed. The first of those articles contained an inquiry, "What tenants ought of right to have any estovers or fuel wood to burn in their houses," and the second, "What common of pasture and for what manner of cattle the tenants had or ought to have in the said forest, and by what right and title, and in what sort and manner, they ought to have the same."

The inquisition thereon, dated the 30th of May, 1610, and taken upon oath by twenty-three jurors, states that the tenants which ought by custom to have estovers or fuel wood within the forest and common of pasture there for their cattle were of three sorts, free tenants, inter-tenants, and foreign tenants (the free tenants being those to whom alone this action relates), that the free tenants and inter-tenants ought by custom to have estovers and herbage in the said forest (except such tenants as have no houses upon their tenements, and those ought to have but herbage only), which estovers must be spent upon the tenements to which the customary estovers do appertain; and that the foreign tenants were to have but herbage only (with such exception as is there mentioned). It further states that "every one of the said customarie tenants shall have common of pasture or herbage within the said forest for all the cattle which he can keep and maintain in the winter upon the proper lands to which the said custom doth belong, all the year except six weeks, that is to say, between the feasts of *St. Michael* and *St. Martin*, in which time no manner of cattle shall come within the said forest, because of the preservation of bushes and mast, and if any be found they shall be impounded and pay ij*d*. for lep" (1). Appended to this inquisition is a full schedule containing the names of the tenants, a description of their several lands in respect of which they were to have herbage, and allowances, made to such of them as had houses, of certain quantities of estovers or fuel wood to their houses, consisting, with very few exceptions, of two loads to each householder.

The Court Rolls from this period contain entries from which it appears that frequent depredations had been committed upon the forest by the copyholders in cutting and carrying away timber, and by digging for stone and mine pits, and leaving them open to the injury of the King's deer and the tenants' cattle, and contrary to the custom,—but there is no mention in any of them of a customary or other right to cut brakes, fern, or litter in the forest.

At a Woodmote Court held after inquisition on the 3rd of December, 1616, the jurors impanelled to inquire for the King "of trespasses and offences committed within the *Forest of Ashdown*," present that "*Thomas Humfrey* cut down within the forest and carried thence '*dumos*' (*Anglicè* 'brakes') contrary to the custom; therefore he is amerced therefor iij*s*. iiij*d*."

At a Woodmote Court, 5th of December, 1620, the jurors presented that *Edward Hylls* cut down "*dumos*" (*Anglicè* "holmes") within the forest aforesaid,—being preserves (" in *Anglicè* litter ") for the King's deer—therefore he is amerced therefor 6*d*. (2).

In the time of the Commonwealth, June, 1650, a return upon a survey was made by Commissioners appointed for that purpose of the Manor of *Duddleswell* and Great Park of *Lancaster*, which contains a very full and minute account of the lands and manors, and of the quit and other rents payable by the tenants. It states that "the free tenants claim to have two loads of birches or alders, against the Feast of Christmas, paying nothing for the same, and the copyholders of *Duddleswell* do claim to have firth and tennett out of the said park for fencing their lands that be within the said park. All the aforesaid tenants do claim to have free boote for chips and axes of beech, birch, and alder. And by their customalls it appears that they have had allowance of a hundred load of marle for ij*d.*, and also been allowed mud for their walls, and stone to underpin their houses, and fern to cover them." And the Commissioners add to their return a suggestion that a considerable quantity of ground may be set out in convenient places for all that have right of custom in the said park, which may be of greater benefit to the tenants than what they now enjoy, considering that there hath been some thousands of deer kept upon the said park, both red and fallow, and also a considerable quantity disposed of for the use of the Commonwealth.

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(1) "Lep" appears not to be the Old English word *lepe* (A.S. *leap*)—a basket or hamper containing the third part of two bushels; but to be the same as "lef" or leave-silver, *i.e.* money paid for leave to feed pigs, &c., the final "p" being probably a misreading of a Saxon letter. See *Elton's Tenures of Kent*, p. 196, see also *Charnock's Manorial Customs of Essex*, p. 6; *Ducange, sub voce* "Lepa."

(2) These passages are translations from the Court Rolls, which were in Latin.

I have thought it right to mention such evidence as has been referred to in the course of the argument before me for the purpose of shewing the state of things at the time when the two decrees of 1691 and 1693 were made, both of those decrees referring to the evidence then before the Court.

Every part of the proceeding in the older suit seems to have been conducted with perfect regularity. The pleadings in the first instance are full and explicit; the evidence on both sides must be taken to have been sufficient. An inquiry is directed in the first instance before commissioners, to be chosen by the parties, to ascertain and lay out for the defendants sufficient common according to their respective rights and in convenient places. But, besides this inquiry, one of the subjects of dispute between the parties was then finally and conclusively disposed of. For the defendants having complained that the plaintiffs had felled great quantities of wood, whereby in a short time there would not be sufficient for their estovers, the decree proceeds to decide that question upon the evidence before it, as to which it fully appeared to the Court that there was no wood ever esteemed, or allowed for estovers but birch, willow and alder only. Where-

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fore, "It is ordered that the plaintiffs be and hereby are at liberty to cut down and fell any sort of woods in the said forest except only birch, willow, and alder, being the sorts of wood usually allowed the said defendants for estovers." By the decree of 1693 the return of the Commissioners is ratified and confirmed, and the rights of the Defendants and their successors to have and take the sole common, pasturage, and herbage of the lands so left for common as aforesaid is established.

It might with good reason have been supposed that after the termination of such a suit as I have described, all questions between the lords of the soil of *Ashdown Forest* and the customary tenants of neighbouring manors had been settled for all time. The Defendants in this suit, who do not dispute the validity or the binding effect of the decrees, read them, however, in a sense different from that which the Plaintiff ascribes to them; the Defendants insisting, first, that as to the 6400 acres, "the rights of the Plaintiff do not now extend to any heather or litter or herbage or to any young seedling firs growing thereon," and, secondly, that the Defendants and the other commoners "are now entitled to the sole common, pasturage, and herbage, including the brakes, fern, heather and litter growing in and upon the said land." In support of this contention the Defendants' counsel by very elaborate arguments have insisted that the decree did not dispose of or settle more than the extent to which the rights of common were appurtenant, and that it did not include nor mean to include the common rights themselves. For they say that the decree declares that the commoners shall have and take "the sole common, pasturage, and herbage;" and they insist upon reading the word "common" as a separate and substantive vocable, and as being different from "common of pasturage." If there were no other reason against this contention I should not be able, having regard to the subject and object of the decree, to adopt the Defendants' construction in this respect. But besides this, and bearing in mind that the return of the Commissioners speaks in plain terms of "common of pasturage," and that by the decree that return is ratified and confirmed (which makes it in effect a part of the decree), I am compelled to hold that there is no substantial difference in point of construction between the words of the declaratory part of the decree and those of the return, but that both of them mean and speak of the commoners' rights of pasturage and herbage and of nothing else. And, further, that it was and is the meaning of the two decrees to define and determine all questions between the Plaintiffs and Defendants as to their respective rights.

A very long and learned argument has been addressed to the Court as to the meaning of "common of pasture and herbage" in the decree. The Plaintiff's counsel resort to the text of *Bracton* (*De Legibus Angliæ* (1)): *Est enim communia in eo quod dicitur pastura de omni quod edi poterit vel pasci, largè sumpto vocabulo vel stricte: large, ut si quis habeat in alieno communiam pasturæ scil. herbagii, pessonæ, sive glandis sive nucis, et quicquid sub nomine pessonæ continetur. Item foliorum et frondium stricte scil. aliquod istorum unum vel duo.*"

They referred also to *Fleta* and *Britton*, the passages in which I need not mention more particularly, since they are merely translations, or, at the most, adaptations of the text of their predecessor. The meaning of the word "*herbagium*" was sought in *Spelman's* Glossary, where it is stated to be, "*Vox forensica a Gallicâ* herbage, *vestura terræ quæ dentibus animalium decerpitur. Occurrit frequens pro jure depascendi alienum solum, ut in forestis,*" &c. And numerous references were made on both sides to the dictionaries of *Cowell* and *Jacob*, and to the Abridgments, and to *Comyn's* Digest, all of which are, at the best, compilations, and the writers do no more than refer to the law as established by the cases to which reference is made.

The Defendants' counsel oppose to the arguments and authorities cited by the Plaintiffs a variety of answers. They say that common of herbage is not confined to the growth of the soil which may be taken by the mouths of beasts. And reproaching their antagonists with not having dug deep enough into the wellsprings to be found in *Bracton*, they cite from Lib. iv. cap. 41, sect. I., "*De communia habendi rationabile estoverium in fundo alieno in boscis et brueriis et aliis in vastis alicujus.*

"*Dictum est supra de communia pasturæ et jure pascendi in alieno, nunc autem dicendum est de alia communia secundum quod*

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(1) Lib. iv. cap. 38.

large se habeat una cum alio non ad pastum sed ad commoditatem aliam, ut si quis habere debeat in fundo alieno jus secandi vel falcandi in foresta vel bosco alicujus vel aliis vastitatibus ad rationabile estoverium suum ædificandi, scilicet claudendi & ardendi & alia quidem quæ necessaria sunt secundum constitutionem servitutis in plus vel minus, in quâ quidem constitutione oportet modum attendere ut estoverium sit rationabile secundum quantitatem bosci vel vasti in quo fuerit servitus constituta secundum quod fuerit ampla vel parva sicut illam petit vel contra, item quantitas tenementi ad quod debetur illa servitus, & sic oportet omnia ponderare quod non excedant modum nec minuantur sed quod omnia permaneant in mensura." And he points out the form of proceeding by which in this respect rights may be asserted or wrongs remedied.

I must, however, say that I do not think that this latter citation accomplishes the purpose for which it is made. I think the writer, although he is clearly speaking of a common-right *secandi vel falcandi,* means a right created by grant or prescription, and distinguishes it from the common of pasture, of which he had before treated, by the limitation *secundum constitutionem servitutis.* And least of all is it to be assumed that a writer who was contemporary with the *Carta de Forestâ* of *Henry* III., and who was a Justice in Eyre, having especially to administer the Forest Law, can have intended in the passage quoted to refer to a servitude existing in a Royal forest, unless it had been created by a grant or supported by prescription. Having regard to the questions which were at issue, and to the long and learned arguments on both sides, and to the facts as they existed before the decree of 1693, the result seems to be that the Crown was the sole and absolute owner of the soil of the *Forest of Ashdown,* and was possessed of all the rights belonging to such ownership, including the rights which in all the older writers on the subject of Forest Laws are compendiously expressed by the term "vert and venison," the definition of which is open to no manner of doubt. "*Dictio forestaria sive ad saltuarios pertinens sensu duplici. Primò, pro potestate quam quis habet per concessionem Regiam secandi ligna viridia infra forestam ad foci sui alimentum. Secundò, pro jure compascendi animalia in forestâ quod alias dicimus herbagium.*" It is equally clear that the tenants of the adjoining manors had customary common-rights within the forest. Those rights, as far as any mention of them is made in the documentary evidence I have referred to, were unquestionably rights of common of pasture, herbage, and pannage. Some other rights are mentioned as being claimed by the commoners not always in exactly the same terms—the claims in 1523 being for (1) "frith and tenante withine the foreste for closes of their lande that be within the said foreste by the deliverance of the forester," marl for mending their lands upon payment of a small sum, heath to thatch their houses, loam to daub their walls, stone to underpin their houses. and fern to mend their lands. The claim by tenure of their custom is also extended to "wain-bote and plough-bote, that is to say, of beech, birch, and alder." In 1610 an inquisition was held by which the right of the tenants to fell wood to be spent upon their houses, and their right to common of pasture or herbage for their cattle, except during six weeks (between the feasts of *St. Michael* and *St. Martin*), "because of the preservation of bushes and mast," is affirmed. In the return by the surveyors under the Commonwealth in 1650 the claim of the tenants is somewhat enlarged. They "claim to have two load of birches or alders against the feast of Christmas, paying nothing for the same." and also "free bote for chips and axes of beech, birch, and alder;" and the surveyors certify that the tenants have had an allowance of a hundred load of marle for ij*d*., and also been allowed mud for their walls and stone to underpin their houses and fern to cover them. But in none of these claims is any mention made of a customary right to cut or mow anything, or in any manner to meddle with the soil of the forest; the estovers of fuel, wood, and the marle, stone, and fern being claimed as having been allowed to them, *i.e.*, by the marshal or verderer or other officers having the care and control of the forest.

In considering what were the respective rights of the Crown and of persons having rights of common in a Royal forest, it must be borne in mind that in all the statutes relating to such forests the Royal prerogative extends, and in all cases is secured, to "vert and venison," and the duties of the verderers and rangers and other officers are mainly directed to their preservation. As regards "vert," with which we are at present concerned, *Manwood's* Forest Laws and *Coke's* 4 Inst. c. 73, contain very distinct and ample details. The latter writer explains *mensis vetitus* in the statute to mean the fawning month for does (p. 312), at which time covert must have been of absolute necessity; and at p. 316, having explained the word "*viridis*," and mentioned its different kinds, he says, "Of bushes and other vegetables—some for food and shelter, as the hawthorn, blackthorn, &c.—some for hiding and shelter, as brakes, gorse, heath, &c. To sum up all: *Plantarum tria sunt genera—arbores, arborescentes et herbæ. Arbores,* as *hautboys et subboys. Arborescentes,* as bushes, brakes, &c." There has been some discussion in the course of the argument as to the true meaning of the word "brakes." One of the Defendants' counsel has proved from the '*Midsummer Night's Dream*' that it may mean a thicket; and another, quoting from *Drayton's* 'Mooncalf,' shewing that it may also mean sorry and insufficient food for cattle. It cannot, I think, be doubted that the word has more meanings than one; that it is often used, especially by the poets, to mean a thicket, and that it is also frequently used to express the indigenous British fern (*Pteris*), which is of common growth in woods and parks. The sense in which it is employed by Lord *Coke* is open to no question; the proof furnished by the Presentments in 1615 and 1620 establishes that cutting by the tenants of brakes and litter was contrary to the law of the forest and not warranted by their custom; and yet the contention of the Defendants in this suit is that they are entitled to cut and carry away from the forest "brakes, fern, heather, and litter." It was argued by the Defendants' counsel that there might be a customary right to cut brakes and litter founded on a prescriptive right, and that a grant of such a right might be presumed. Passing by the staring improbability that a grant might have been made in a Royal forest in which the preservation of the deer is proved to have been an object of great solicitude by the Crown and its officers, by which grant the commoners would have been at liberty to disturb, and if they were sufficiently numerous, to destroy the coverts, it is sufficient to say that no evidence has been at any time given of the existence of any such custom. Not only are the convictions I have referred to made of persons offending "contrary to their custom" proved, but no claim to any such custom is made in the answers of the Defendants in the former suit, and especially there is none such made by *John Day* at a time when there was full opportunity, and the most obvious intention and interest, for all of the then Defendants to assert their rights to the utmost. And I cannot adopt the suggestion that the commoners might have had the prescriptive right now claimed for them, and that such right is not prejudiced by their then neglecting to make it, or that the decree, purposely or otherwise, omitted to mention it.

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(1) In the presentment of March, 1545–6, it is represented that the king's tenants shall have "fryth and tenet within the forest for closure of their lands that lye within the said forest by the deliverance of the forester."

From *Halliwell's* Dictionary of Archaic and Provincial Terms, it appears that "frith" is the term used for young underwood, brushwood, or the loppings or "plashings" of hedges.

Very numerous authorities were referred to by the Defendants for the purpose of shewing that there might have been a valid custom to cut rushes and other things not taken by the mouths of cattle, and among them *Smith* v. *Earl Brownlow* (1) and *Warrick* v. *Queen's College, Oxford* (2), do unquestionably establish the rights of commoners to cut fern and gorse in the circumstances there existing. But in those and in all other cases where the right was established the existence of the alleged custom was proved. In the first of those cases the principal question was whether the lord of the manor who sought to improve the waste had left sufficient common; and it being established that he had not, the common-rights which were not in dispute were established. In the second case it was disputed whether the freeholders and copyhold tenants were properly joined in the assertion of the rights claimed, and this being decided in favour of the Plaintiff the common-rights as they were proved were confirmed. It is not necessary that I should refer to the numerous other cases cited, all of which I have looked into, since they all relate to customs proved, while I have to deal with an alleged custom which is not only improbable and unreasonable and inconsistent with the unquestionable rights of the Crown and the commoners, but the existence of which is disproved by more than negative evidence, and is, as I conceive, effectually disposed of by the judicial decision pronounced in 1693. And I must further say that in all the authorities which have been referred to from the Year Book of *Henry* VIII., through all the cases mentioned in *Viner* and in *Comyn*, it is stated as a universal principle of law that a commoner has no right as against the lord to meddle with the soil over which his right of common extends, nor to cut or carry away grass or herbage without a special custom authorizing him to do so. No case has been cited, nor, as far as I know, can any be found in which this established principle of law is controverted. And in the case before me I can perceive no evidence of the existence of any such special custom. It would, I think, be altogether improper to go behind or to seek to go beyond the decree. Down to the time when it was pronounced, then, I must take it to be established in law and in fact that the commoners neither had nor claimed any prescriptive or other right to cut or carry away anything belonging to or the growth of the soil of the forest; and that their right to estovers was no other than that which is established by the decree of 1693, and which is not disputed by the Plaintiff. And I think it is equally clear that, subject to the rights of the commoners as declared and established by the decree, the soil of the forest and everything growing on it or appertaining to it is vested in and belongs to the owner of the 13,991 acres of which the forest is found to consist. It is proved on the part of the Plaintiff, and not disputed by any evidence for the Defendants, that there are within the forest considerable tracts of fern and heather, that persons without any authority or license are in the frequent habit of cutting down brakes, or fern and heather, cutting also the tops of young fir-trees growing together with them, and of selling what they so cut by the waggon-load at various prices according to the distance these things have to be carried; that women and children are employed to assist in this sort of cutting, the practice of which has of late greatly increased, and that thereby the timber in the forest is greatly damaged. And the Defendants have admitted that such cutting has been exercised, and that the operation is performed by implements kept and used by them for the purpose, consisting of a sickle for the brakes and a short scythe for the heather.

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(1) Law Rep. 9 Eq. 241.

(2) Law Rep. 10 Eq. 105; Ibid. 6 Ch. 716.

The Defendants nevertheless, in addition to their other grounds of defence, insist that this more recent practice is evidence which supports their claim, and may be resorted to by them for explaining and clearing away any ambiguity in the decree. It is not to be disputed that when the necessity of the case requires it, evidence of more recent usage and custom may be adduced for the purpose of explaining old, or obsolete, or even imperfect expressions to be found in ancient documents. But the necessity must be apparent, the ambiguity must be found to be existing. In the present case I perceive no ambiguity in any of the documentary evidence which has been referred to, and least of all in the decrees which are in terms perfectly explicit, according with the well established terms, forms, and phraseology of the procedure of the Court of Chancery of the present day, and written in as good English as was used in the days of *Addison*. The Defendants have proved by the cross-examination of some of the Plaintiff's witnesses, and by several witnesses called on their own part, that the practice of which the Plaintiff complains has prevailed not only without interruption for many years, but with the sanction and assent of the predecessors in title of the Plaintiff, two aged men carrying it on beyond the period of sixty years before the present suit. Books of account kept by farmers who were entitled to rights of common, some of them of still earlier date, have been referred to containing entries of payments for cutting brakes and litter. The books of the Defendant Mr. *Hale* from the year 1845, and those of his wife's former husband from 1833, contain several entries of similar payments. The Plaintiff's counsel objected to the admissibility of these books, and in my opinion they cannot be received as evidence against the Plaintiff upon the issues in this action. And I must add that if they were received in evidence they would furnish no proof upon which a decree could be founded. The utmost they can be said to establish is that at the times recorded in them the payments there mentioned were made in respect of brakes and litter cut probably in the *Forest of Ashdown*, and that the items were carried into the farming accounts as disbursements. As to the account books of Mr. and Mrs. *Hale*, they are not admissible in evidence, and they add nothing to their statement that such like payments have been in fact made by them. What Mr. *Hale* has said in his evidence is that during his occupation it has been usual in autumn to cut in the forest heather, brakes, fern, and gorse, with which some grass was necessarily mixed up; that his own servants most frequently cut them, and they were carried by his own teams to his dung-yard, where, having become manure, that manure was carried on to his land and ploughed in; that this was done in a customary open manner with the knowledge of the Plaintiff's predecessors in title and without interference by them or any other person until shortly before the commencement of this action. Upon some occasions he has employed men—not having commonable rights, and not being his regular servants—and their families to cut litter for him, not paying them anything for the litter but for the work of cutting. He has occasionally bought litter from the men by whom it was cut, and has paid for it at the like rates, not as for the purchase of the litter but for the labour employed in cutting it.

He has also said that upon his purchasing the land he now occupies the particulars of sale under which he purchased described the common right of cutting litter as being valuable and advantageous, and that he so considers it. The stewards of Sir *Thomas Maryon Wilson* and of Lord *Sheffield* and other neighbouring landowners and others having right of common, gave evidence to the effect that the cutting fern and litter has been constantly practised with respect to the several lands entitled to common under the decree of 1693; that they have paid the persons employed in the cutting for their labour and not for the litter, and that this has been done for several years without objection or interruption. Mr. *Roper*, the Defendants' solicitor, who from 1870 has been solicitor of the *Ashdown Park* estate, produced the account books of the former bailiff and of that estate from the year 1792, and which were continued to the year 1835, containing entries similar to those I have before referred to. Besides this, a great body of evidence was adduced by the Defendants consisting of notices given, some on behalf of the owners of the soil, and some on their behalf, together with the commoners, forbidding all persons not entitled to rights of common from (amongst other things) cutting or carrying off any litter from the forest. It was also proved that correspondence had taken place between a Mr. *Barrow*, the steward of the owners, and Mr. *Abbott* (the Speaker), afterwards Lord *Colchester*, and in 1816 between Mr. *Abbott* and

Lord *Whitworth*, the husband of the Duchess of *Dorset*, on the subject of some inclosures said to have been made in derogation of the commoners' rights over parts of the 6400 acres, and also of the prohibition against cutting bushes, turf, heather, &c. The latter correspondence was such as might be expected between the persons by whom it was carried on: Mr. *Abbott* insisting upon what he conceived to be rights of the commoners, including the right to cut litter, and Lord *Whitworth*, for himself and the Duchess, being willing to abide by Mr. *Abbott's* opinion. It was at this time suggested that a public meeting should be held for the purpose of considering and settling the matters then in dispute, and a meeting was accordingly held in August, 1816, "of all persons interested or claiming to be interested as lords of manors, or as having rights of common in or upon the waste of *Ashdown Forest*, in order to take into consideration their respective rights and to regulate the exercise thereof in such manner as would be most beneficial to all parties." At this meeting it was resolved that the inclosures complained of should be removed, and further, "that the commoners upon the said forest being entitled by usage to cut litter upon all parts of the said forest, nevertheless for the better growth of the litter in general, and also for the better preservation of the game in those places where it appears to be the wish of the lord of the manor that it should be preserved, will conform to the following rules, namely: To cut no litter upon the forest between the 31st of December and the 1st of September in every year, and to abstain from exercising their right of cutting litter altogether within any of the places under-mentioned which are now marked out by posts, viz., &c., &c., total acres, 270; but such several places so set apart for the preservation of game amounting in the whole to 270 acres or thereabouts are nevertheless not to be inclosed except by the authority of any future Act of Parliament for the general division and inclosure of the forest.

It was also proved that several other meetings of a like kind and for similar objects were held, and that resolutions were then passed and acted upon with the assent of the Plaintiff's successive predecessors in title, and with the full knowledge and acquiescence of Mr. *Hunt*, then the solicitor and steward of that Lord *De la Warr*; and that he (Mr. *Hunt*) had stated in one of the letters referred to that Lord *De la Warr* had no common right in, but was simply entitled to the soil of, the land over which the common rights extended. I do not think it necessary to advert to this evidence more particularly, for it is not disputed that there was a general belief that the commoners were entitled to the rights which are now claimed by the Defendant in this suit, and that such belief continued at least down to August, 1874, when Mr. *Hunt*, acting on behalf of the Plaintiff, and with his authority, made no objection to the proposal then submitted to him by Mr. *Roper*, and assured him that it would have the Plaintiff's "moral support." Mr. *Hunt* has stated that such was his belief, but he has stated also that subsequent examination and consideration have convinced him that that belief was formed under an erroneous notion of the law. If the Plaintiff is now right in the claim which he now makes, that right cannot have been lost or extinguished by anything that may have been done or said by his agents or by the successive tenants for life of the estate which is now his, nor by any erroneous notion which he may formerly have entertained as to the extent of those rights. Assuming, therefore, that, during all the period covered by the evidence adduced on the part of the Defendants, they and the other commoners have exercised the several acts alleged by them, that they have mowed or cut down brakes and heather and have carried away what they so cut down and converted it into litter and ultimately into manure, and have spent that manure upon their farms, and that in doing this they have had the countenance and encouragement, and not only the assent but the assistance of the several tenants for life, the predecessors of the Plaintiff, I do not think that by so doing they have acquired a right against the owner of the inheritance to continue such practice for the time to come.

There remains yet to be considered one other ground of defence which is set up, viz., that the Defendant *Hale* and his wife and their predecessors in title, owners of the particular tenement and the several occupiers of the same tenement from time to time, "have actually taken and enjoyed as of right in respect of the said tenement without interruption for the full period of thirty years and sixty years respectively next preceding the commencement of this action, the right, profit, or benefit of cutting and carrying away

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brakes, fern, heather, and litter, in and from the said 6400 acres sufficient for the manurage, improvement, maintenance, sustaining, repairing, and amendment of the said tenement." To this the Plaintiff has replied that this claim is inconsistent with the customary common right previously claimed by the Defendants, and that it cannot be claimed under a prescriptive title. That it is a claim of *profit à prendre in alieno solo* seems indisputable, and being so, I think the decisions which have been referred to in the course of the argument establish that it cannot be sustained. Among those decisions it seems to me only necessary to mention the opinions of the Judges in *Blewett* v. *Tregonning* (1), *Lord Rivers* v. *Adams* (2), and *Attorney-General* v. *Mathias* (3); and the comments of the Master of the Rolls in *Chilton* v. *Corporation of London* (4) on a case of *Willingale* v. *Maitland* (5). Upon these authorities it appears to me that if the substance of the defence to which I have just adverted had been pleaded such a plea would have been demurrable, and the demurrer would have been allowed, and being set up, as it has been, in the shape of an alternative defence, it cannot be sustained. The conclusion to which I come, after having bestowed my closest attention to the case as it is proved in evidence, and to the very learned, elaborate, and earnest arguments which have been addressed to me by counsel, is, that the rights of the parties were entirely and finally disposed of and established by the decree of 1691 and 1693; that the words "common pasturage and herbage" express only the rights of commoners to feed by the mouths of their cattle, the growth of the soil, and that alone; that there is no ground upon which I can hold that at any time there existed within the *Forest of Ashdown* a special custom conferring a right on the commoners to cut and carry any part of the growth of the soil; and that the usage and practice which is proved by the Defendants to have existed for more than sixty years, and not disputed by the Plaintiff, cannot be referred to any custom, prescriptive or otherwise, existing at the date of the decree of 1693, but is referable only to the consent and sufferance of successive tenants for life of the lands of which the Plaintiff is the absolute owner. I am, therefore, of opinion that he is entitled in this suit to the injunction prayed for in his statement of claim.

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(1) 3 Ad. & E. 554.

(2) 3 Ex. D. 361.

(3) 4 K. & J. 579. 4 Jur. N.S. 538

(4) 7 Ch. D. 735.

(5) Law Rep. 3 Eq 103.

Judgment for Plaintiff with costs.

C. A. The Defendants appealed. The appeal came on to be heard on the 5th of February, 1881.

Joshua Williams, Q.C., *Webster*, Q.C., and *P. H. Lawrence*, for the Appellants:—

We claim to cut this litter not only as part of our right of common, but also as being the managers of the common, and entitled as such to cut down all those growths that would interfere with our sole pasture.

The right claimed is one which can be lawfully prescribed for as a right of common: *Manwood*, Forest Law (1); *Suckerman* v. *Warner* (2); *Vin.* Abr. "Common," A (3); *Smith* v. *Earl Brownlow* (4); *Warrick* v. *Queen's College, Oxford* (5); *Commissioners of Sewers of the City of London* v. *Glasse* (6). The Vice-Chancellor erred in comparing a right to common claimed by prescription as appurtenant to lands with a claim by custom. No custom is alleged by the Defendants. Then as to the decree of 1693, if the construction put upon it by the Vice-Chancellor is correct, the tenants lose their estovers and get nothing.

[COTTON, L.J.:—Did not your predecessor in title abandon all claim to estovers in that suit?]

There may be a right to estovers included in a right of common, and we say that the decree gives us this. There may be a prescription for sole pasturage to the exclusion of the lord: *Potter* v. *North* (7). A very limited meaning of the word "herbage" is given by *Cowell*, Law Dict. "Herbage," *Jacob*, Law Dict. "Herbage," but *Du Cange*, Glossary, "Herbagium," and *Thew* v. *Wingate* (8), shew that it is not confined to what can be taken by the bite of cattle. The right is sufficiently evidenced by enjoyment, though the owners of the property against which it is claimed may only have been successive tenants for life: *Greenslade* v. *Darby* (1). Modern usage may be admitted to explain any ambiguity in the decree, or to explain and vary the sense in which special words therein are to be read: *Taylor* on Evidence (2); *Stammers* v. *Dixon* (3); *Doe* v. *Beviss* (4); *Johnson* v. *Barnes* (5); *Duke of Beaufort* v. *Swansea Corporation* (6); *Calmady* v. *Rowe* (7). When the usage is strong and open, as it is here, the Court cannot shut their eyes to it all, even if the decree were plainer than it is. And the claim was not an undefined claim, but was by a class defined by the decree, and for an object defined by the reasonable wants of the tenements. A claim by prescription to have common in another person's land to the exclusion of the owner is void, but if confined within certain times of the year it may be good: *Co. Litt.* (8). We say that sole pasturage alone would include the right now claimed if the user has been accordingly: *Com.* Dig. (9); *Beau* v. *Bloom* (10). No sufficient answer is given to our claim under the *Prescription Act*, 2 & 3 Will. 4, c. 71; and if we have claimed too much, evidence of the enjoyment of a more extensive claim will support our title to a less right: *Bailiffs of Tewkesbury* v. *Bricknell* (11).

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(1) Page 247, §§ 65, 66.
(2) 2 Buls. 248.
(3) Pl. 7.
(4) Law Rep. 9 Eq. 241.
(5) Law Rep. 10 Eq. 105; Ibid. 6 Ch. 716.
(6) Ibid. 7 Ch. 456.
(7) 1 Wms. Saund. 350, 353 a.
(8) 10 B. & S. 714, 719, 721.

The cases of *Blewett* v. *Tregonning* (12), *Lord Rivers* v. *Adams* (13), *Attorney-General* v. *Mathias* (14), *Chilton* v. *Corporation of London* (15), *Willingale* v. *Maitland* (16), cited by Vice-Chancellor *Bacon*, have nothing to do with the claim of the Defendants to cut heather and litter. We do not claim this *profit à prendre* as inhabitants under the general custom of a district, or as members of a fluctuating body of persons, like the parishioners of a parish, but as a prescriptive right appurtenant to our tenement, which we have exercised for sixty-five years. That gives us no right to the soil, but is a right well known to the law and quite different from that claimed in those cases. We do not claim to oust the lord, although a prescriptive right that will have the effect of excluding the lord may be good: *Potter* v. *North* (1); and a several prescriptive right is good and may be pleaded: *Welcome* v. *Upton* (2). The right we claim could pass under the words "herbage," "common," or "pasturage," in the decree, and evidence is admissible to shew what interpretation has been given to the decree by usage. The evidence shews that prior to the decree there was a particular class of persons exercising in a quasi-corporate capacity the particular rights we claim, and that the decree was made to settle for ever the questions between the lord and the several persons claiming these rights. By the decree the lord was to be excluded from "sole herbage," and "sole herbage" may mean more than what can be taken by bite of cattle. If so, subsequent usage is let in to shew what those words mean. Again, the word "sole" in "sole common pasturage," refers to the lord, and "common" to the parties themselves, and granted us pasturage and herbage in exclusion of the lord: *Thew* v. *Wingate* (3). It is not "common of pasture" and "common of herbage," and there is no reason why the "of" should be inserted in the decree if a clear meaning can be given to it without such insertion. There is no meaning attributable to the word "sole" unless the lord is to be excluded. But if the evidence is not admissible to explain the decree, it is admissible to prove our title under the *Prescription Act*, which we say is fully established, our rights having been exercised openly, and without objection and without any evidence of permission or consent in writing: so that, assuming that at the date of the decree we had no such rights as now claimed, we submit that we have acquired the right by prescription: *Commissioners of Sewers* v. *Glasse* (4); *Warrick* v. *Queen's College, Oxford* (5); *Doe* v. *Beviss* (6); *Lord Rivers* v. *Adams* (7); *Johnson* v. *Barnes* (8). In the last cited case the class was no more defined than here. It makes no difference how the user began, whether by assent or claim of right, unless there has been a license in writing. Permission must be proved, it cannot be assumed: *Beeston* v. *Weate* (1).

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(1) Law Rep. 3 Q. B. 421.
(2) 5th Ed. p 1037. 8th Ed 1045.
(3) 7 East, 200.
(4) 7 C. B. 456.
(5) Law Rep. 7 C. P. 592; Ibid. 8 C. P. 527.
(6) 3 Ex. 413.
(7) 6 C. B. 861.
(8) 122 b.
(9) III. 68–69, 70.
(10) 3 Wils. 456.
(11) 1 Taunt. 142.
(12) 3 Ad. & E. 554.
(13) 3 Ex. D. 361.
(14) 4 K. & J. 579. 4 Jur NS 629
(15) 7 Ch. D. 735.
(16) Law Rep. 3 Eq. 103.

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(1) 1 Wms. Saund. 350, 353 a.

(2) 6 M. & W. 536.

(3) 10 B. & S. 714.

(4) Law Rep. 19 Eq. 134.

(5) Law Rep. 10 Eq. 105; Ibid. 6 Ch. 716.

(6) 7 C. B. 456.

(7) 3 Ex. D. 361, 366.

(8) Law Rep. 8 C. P. 527.

[On the question of the defence under the *Prescription Act* raised by sect. 15 for the Defendants' tenement alone, the question was raised whether the farm books and other evidence relating to the tenements of other commoners were evidence to support *Hale's* right; but this evidence was not admitted.]

In conclusion, then, we rest, 1. on the interpretation of the decree by internal evidence and by constant user; 2. by a prescription for the whole class of commoners, whether they took it by misconstruction of the decree, or by a usage which goes back to the oldest customals; 3. by a prescription in *Hale* only, acquired by sixty years' user as of right, irrespective of all questions of mistaken claims or general consent.

[*Campbell* v. *Wilson* (2), *Codling* v. *Johnson* (3), *Aynsley* v. *Glover* (4), and *Lee* v. *Johnstone* (5), were also referred to.]

Elton, Costelloe, and *E. B. Cope,* for the Plaintiff:—

[James, L.J.:—We do not desire to hear you as to the construction of the decree or as to any evidence of the state of things prior to the decree, but as to the effect of what has taken place since the decree.]

The decree is clear in our favour, especially by reference to the inquisition of *James* I. Therefore we say that this right as pleaded cannot be maintained either by the commoners together or by *Hale* singly, because it is not, in the words of the *Prescription Act,* "a claim which may be lawfully made at the common law by custom, prescription, or grant." The user cannot be justified under a custom: *Gateward's Case* (6); *Sowerby* v. *Coleman* (7). A claim by custom must be a custom in an ancient district; a number of otherwise unconnected people cannot claim a right and then say that they constitute a district: *Co. Litt.* (8). Here there

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(1) 5 E. & B. 986. 2 Jur. N.S. 540

(2) 3 East, 294.

(3) 9 B. & C. 933.

(4) Law Rep. 10 Ch. 283.

(5) Law Rep. 1 H. L., Sc. 426.

(6) 6 Rep. 59 b.

(7) Law Rep. 2 Ex. 96.

(8) 110 a, b.

C. A.
1881
EARL
DE LA WARR
v.
MILES.

is no district. *Beau* v. *Bloom* (1) went only on a point of pleading, and does not support the Defendants' case, and *Selby* v. *Robinson* (2) and *Grimstead* v. *Marlowe* (3) are opposed to it. A lawful prescription might support the Defendants' case, but there is no evidence of their claiming a particular right as appurtenant to their tenement. The evidence goes to shew a state of things inconsistent with that claim altogether. The user may in fact have been had, but it was under colour of a right which cannot be supported. Where a general right is claimed which could not possibly have a legal origin, you cannot then (as the Master of the Rolls said in *Hammerton* v. *Honey* (4)) select a small fragment of the total claim for which a legal origin could be found, and say that you have proved that. The evidence you bring if it proves any user at all, proves the general claim, which is illegal, and so negatives the smaller claim. If the smaller claim (*e.g.* for *Hale* singly) had been alone pleaded, it would have been possible to rebut it by shewing that the actual claim was not that but another, namely, by all the commoners at least, if not by all the inhabitants indiscriminately.

A prescription, to be valid, must be claimed in respect of a tenement, and although the occupier of the tenement may have had the user, yet if he claimed to have it not in respect of the tenement, but under a void custom, he cannot have the benefit of prescription: *Blewett* v. *Tregonning* (5). The Court cannot recognise a user under colour of a void custom as conferring any right. The claim must be of something which could lawfully have been granted: *Clayton* v. *Corby* (6); *Baylis* v. *Tyssen-Amhurst* (7); *Blundell* v. *Catterall* (8); *Hanmer* v. *Chance* (9). No grant before legal memory could possibly have been made to all these people to cut vert *ad libitum*, for this was a Royal forest; and if the Court are asked to suppose a lost grant in recent times, *i.e.*, since the decree, then, according to *Blewett* v. *Tregonning*, it is not an admissible claim, for a modern lost grant must not be invented unless some special cause is shewn for supposing that there was

(1) 3 Wils. 456.
(2) 2 T. R. 758.
(3) 4 T. R. 717.
(4) 24 W. R. 603, 604.
(5) 3 Ad. & E. 554.
(6) 5 Q. B. 415.
(7) 6 Ch. D. 500.
(8) 5 B. & A. 268, 315.
(9) 4 D. J. & S. 626. // Jur 45.397

a grant made at some defined time and by a definite person, for which there is no pretence here. This right then can have no possible legal origin in any of the three ways referred to in the statute. We submit that the words "taken and enjoyed by any person claiming right thereto" must be taken as referring directly to the "claim which may be lawfully made at the common law by custom, prescription, or right," and that "the right thereto" (or, as in sect. 7, "the right or claim"), which is made indefeasible by the statute, must not be referred to any new claim different from that by which the user has been taken; and if the latter is a claim that could have no legal origin, the statute cannot apply. Whatever may be the case as to lights, the earlier sections of the statute do not create any new kind of title: they only facilitate proof of such titles as might have been provable before. But in this case there is no possible state of facts in the nature of a custom, or a prescription, or an ancient grant, or a modern grant, which the Court can properly imagine, so as to give a legal origin to the general taking which the Defendants have alleged. There is no proper evidence of user in the first year of the sixty, which is necessary: *Carr* v. *Foster* (1), or in the last year, which is also necessary: *Parker* v. *Mitchell* (2), both of which points were recognised in *Lowe* v. *Carpenter* (3).

[COTTON, L.J., referred to *Bailey* v. *Appleyard* (4).]

The statute is highly technical, and its requirements must be strictly complied with: *Staffordshire and Worcestershire Canal Navigation* v. *Birmingham Canal Navigation* (5). This case, with *Mill* v. *Commissioners of the New Forest* (6), shews that the Courts have gone into questions as to possible legal origin of the claims put forward, irrespective of the length of user. The enjoyment must be connected with the right claimed: *Holford* v. *Hankinson* (7); the claimant cannot turn round on the landowner and establish a different right by means of a user which the lord may have winked at, precisely because he knew that such a right as was set up could not be established in point of law.

(1) 3 Q. B. 581.
(2) 11 Ad. & E. 788.
(3) 6 Ex. 825.
(4) 8 Ad. & E. 161.
(5) Law Rep. 1 H. L. 254, 278.
(6) 18 C. B. 60.
(7) 5 Q. B. 584.

For this, as was said by the Court in *Lord Rivers* v. *Adams* (1), might be doing the greatest injustice. In fact it would lead to a legal contradiction: for it would subject the owner of the soil to a possible series of claims by each of the inhabitants for himself, so as in the end to set up indirectly a custom in the inhabitants, which if pleaded directly on the very same evidence would be defeated as being bad in law.

[The question of the user was also argued on the points: 1. Whether in fact the Defendant *Hale* and the other commoners had not in reality bought fern from "cutters" (who had themselves in any view no right), and paid a price which included not only the wages of cutting, but also the value of the stuff. 2. Whether, apart from the farm books of other tenements (which were not evidence for *Hale*), there was any definite evidence of user in the first year of the sixty years' period. 3. Whether the user was not founded on a "consent in writing" contained in certain letters which passed between Lord *Whitworth* and the commoners in 1816.]

JAMES, L.J.:—

In my opinion the Defendant Mr. *Hale* has proved that for a period of upwards of sixty years he has claimed to take, and has taken, not by way of permission, not by way of concession on the part of the lord, but has taken as of right—that is to say, as a thing which he was entitled to do under some right or other—the litter from the forest to his farm for the use of that farm for the agricultural purposes for which litter would be used on that farm. That is what he has set up by the 15th paragraph of his defence, and it appears to me that he has succeeded in proving distinctly that he has done so.

Now, is that within the *Prescription Act?* It appears to me that if we were to hold that it was not, we should be repealing the Act. What the Act was intended to legalize was a thing which had been done, as of right, for a sufficient period. It has been contended on behalf of the Plaintiff that not only must it be shewn to have been done as of right, but it must be shewn to have been done under a claim of some right capable of being supported as valid by prescription, or grant, or custom; and that if the thing was done under a claim to a right which could under no circumstances be a valid legal right, the thing would not be legalized by the *Prescription Act*.

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(1) 3 Ex. D. 371, and cases there cited.

In my opinion that contention cannot be supported. It does not signify, as it seems to me, what was the nature of the claim made, provided the thing actually done was a thing a right to do which could have been legally granted to the man who was doing it, so that a right to do it could have had a legal origin. Now, the thing actually done, according to the evidence, is going to the forest to cut litter, not for the purpose of sale, but only for the purpose of being used on the farm to which that litter was carried. A right to do this could be legally claimed by prescription. If occupiers of the farm had been cutting litter for sixty years for the purpose of sale, a claim under the *Prescription Act* of a right to do so being confined to one particular matter growing upon the common possibly might be supported. But we need not give any opinion on that, for the user here is confined to the taking of the litter to the farm-yard, there to be used as litter. Then it is said: "Yes, but you are doing this as one of a great body of persons." Now, there might have been something in that objection if what was done had been done by every inhabitant and by everybody so that you could not distinguish between what one inhabitant or person was doing from what the others were doing—that there was nothing which you could shew as to the acts of the one which did not apply to the others. For instance, if the owner of a particular house in *London* shews that he and all the people who have lived in that house have for a long period gone every year to *Hampstead Heath* and run about the *Heath*, he cannot thereby establish a particular right, as annexed to that house, to go upon *Hampstead Heath*, when it is quite clear that he only went there like every other person who went from *London* to recreate himself there. But here it is quite manifest from all the evidence, that there was a distinct right claimed, and a distinct right of a legal character claimed, by a particular class of persons who could in law have taken that right, not *quà* class, not as a corporation or *quasi* corporation, but as a set of owners of particular tenements, every one of whom might have had a valid legal grant of such a right as is claimed by this Defendant. It would not be a grant to a class, they are a class only, because every one of them has got the same right. It is not a claim by custom. It is not a claim by a body of persons incapable of receiving such a grant, but a claim by each and every of a particular class of persons, each of whom is recognised and marked by being owner of a particular tenement as appurtenant to which he was claiming the right. There is nothing in point of law to prevent a grant of this kind, which might have been made if the lord had chosen to do it,—"Whereas certain persons have already got the right of sole common of pasture upon this land in respect of their farms, now I do grant to every one of those same persons that, in addition to that right of common, each and every of them shall have the right of cutting litter thereon for the improvement of his farm." That would have been a perfectly valid grant, even if made by one general deed. Therefore there is nothing in the fact that this Defendant was doing that which every other person in the same circumstances as himself was doing, and it does not derogate from his special right, that other persons in the same condition with himself were doing exactly the same thing. It cannot be brought up to this, that he and all of them were in fact members of that class of trespassers which he and the other landowners, as well as the lord, were endeavouring to the best of their powers to put down, because they were trespassers, and because they had no rights. Therefore it appears to me that the objection as to the nature of the claim made by the Defendant fails.

[His Lordship then considered a contention that Mr. *Hale* during part of the sixty years had not cut brakes, heather, and litter, but had bought them from trespassers who had cut them, and stated his conclusion that it was not supported by the evidence. His Lordship continued :—]

Speaking as a juryman and a judge of fact, I am satisfied that Mr. *Hale* has proved that he and his predecessors in title did by themselves and their workmen for the whole period of sixty years required by the statute go upon the forest and cut litter and take it to be used on his farm.

There was another point as to which we did not call upon the Respondent's counsel, namely, the construction of the decree of the Duchy Court. It is impossible, as it seems to me, to give to that decree the meaning which has been attempted to be assigned to it by the Appellant's counsel. When we look at the object and the nature of the suit, the decree seems to me to be plain beyond all reasonable doubt. The lord having a very large waste, which evidently was much more than was wanted for the commonable cattle of the persons who had rights of common, commenced a suit in the Duchy Court of *Lancaster* which had jurisdiction over this matter (it is said to have been, and apparently was, an amicable suit), for the purpose of seeing how much of the waste he could take without injuring the commoners, and how much ought to be left to the commoners for the exercise of their rights of common. It was an approvement under the *Statute of Merton* through the medium of the Court; that is to say, the Court was asked to ascertain how much the lord could properly and justifiably approve under the statute as against the common of pasture. That appears to me to be the only thing that was determined, and the only thing that was intended to be determined, except a question about particular estovers which are comparatively of little amount, namely, estovers of birch, willow, and alder, which was determined by the first decree. The subsequent decree comes only to this: Whereas the commoners and the lord have now the right of enjoying the whole pasture by the mouths of their cattle in common, you, the commoners, shall now on a particular part of that common have the sole common pasturage and herbage; and the lord shall take the rest for himself, and shall not have any common of pasture or herbage upon that part which has been assigned to the commoners. It appears to me that the meaning of that was perfectly plain—that the commoners were to have not any new common—not any new right in the herbage or pasturage, but that they were to have the enjoyment, as under the old right of common, of common of pasture and herbage in this spot, exclusive of the lord, sole as against the lord, but in common as between themselves; and that the lord was to be excluded from having any right of common with them in that spot. They were intended to have the common ordinary well-known common of pasture or herbage which was known to the law at that time as it is now known. I am of opinion that we cannot enlarge it.

We can only say that they did take that common of pasture and common of herbage to themselves, exclusive of the lord, which they had before—that was common of pasture and herbage in the ordinary sense of the words—the taking of the grass by the mouths of their commonable cattle. Therefore it appeared to us that the decree was perfectly clear upon this point, and that we could not attend to the great body of evidence that was used for the purpose, as it was said, of construing by user an ambiguous term in the decree, since, in our judgment, there was no such ambiguity. Therefore, upon that part of the case the Defendant fails; and, in my opinion, he also fails in establishing that any such right as he now claims existed prior to the decree.

I am, therefore, of opinion that the Defendant has failed in everything but the right set up in the 15th paragraph of his defence, but that he is entitled to the judgment of the Court upon that paragraph, and therefore to have the action dismissed.

BRETT, L.J.:—

This action was brought claiming relief in respect of certain acts which were said to be trespasses, and in respect of a manifest intention to continue those acts unless they were stopped. The action was brought by the owner of the land. Those acts were *primâ facie* trespasses, and the Defendants were called upon to justify them.

The Defendants by their statement of defence set up four distinct defences. Their first defence was founded upon an allegation that the acts now complained of had, in a suit between the predecessors of the Plaintiff and the predecessors of the Defendants, been determined by decree, which was pleaded, to be lawful acts on the part of the predecessors of the Defendants. This first defence raised a question as to what was the true construction of that decree. They next assumed to defend on the ground of a common law prescription, that is to say, an immemorial prescription on the part of the predecessors of the Defendants and others to do the acts complained of. The third defence was that a grant by the predecessors of the Plaintiff had been made to the predecessors of the Defendants and others to do these acts, which grant was lost. They then, as an absolutely distinct defence, relied upon user by themselves and their predecessors for sixty years as giving them under the *Prescription Act* a right to do what is complained of by the Plaintiff.

With regard to the defence under the decree. We had very learned and abstruse readings given to us from old books and from dictionaries, in order to lead us to the conclusion that in the words "the sole common pasturage and herbage" was included the right to cut and carry away the brake, fern, heather and litter for the use of the farms of the commoners. Now I declined, upon reading the whole of the proceedings in the suit in which that decree was made, to construe that decree by old books or by dictionaries. It seems to me that the words, taking the whole of the decree and the pleadings in that suit, are not ambiguous, but perfectly plain. It is clear from the pleadings in that case that the Defendants in it claimed nothing but a well-known right, namely, the right of common of pasturage and herbage; that is to say, a right in respect of their tenements to feed upon this waste by the mouths of their cattle; taking not merely the grass, but whatever the cattle would eat, which I take to be included under the word "herbage" in that decree. That was all they claimed as being that part of the value of the whole waste which was to be taken into consideration in apportioning the subject-matter of that suit, and determining how much the lord should be allowed to inclose, and how much should be left open for the commoners. That being the state of the pleadings, the meaning of the decree seems to me to be perfectly clear. It only dealt with that which was claimed. It empowered the lord to inclose a certain portion of the waste, and it left the other portion to be used by the commoners in the way in which they had claimed to use the whole waste, but shut out the lord from that which would otherwise have been his right, namely, to share in that mode of dealing with that part of the waste or forest which was to be left uninclosed. Therefore the real meaning of the decree was, that as to these 6400 acres which were left open, the commoners were to have the right of taking such estovers as they had claimed in certain woods, and they were to have the right, with regard to the cattle on their farms, to common of pasture and herbage in the sense I have stated, that is, feeding by the mouths of their cattle; that the lord was to give up his right to put his own cattle on that part of the forest, and any right of taking that wood which they would have to take as estovers; but it left the lord in the possession, with regard to that uninclosed part, of every other right which he had possessed before. It did not, therefore, give the commoners the right which they now claim to cut brake, fern, heather, and litter growing upon that waste for the use of their farms. That they had not claimed, and that was not given to them, and evidently that subject-matter did not enter into the contemplation of any of the parties to that suit. Therefore, upon the interpretation of the decree, I think that the contention of the present Defendants has been wrong from the beginning, and that the Plaintiff was right in his contention.

It was attempted to lead us to a contrary conclusion by a mass of evidence of alleged user since the time of that decree until now, for the purpose of construing that decree. Of course evidence may always be given of the state of things existing at the time that a decree is made or a deed is executed. It is very rarely indeed that you are allowed, for the purpose of construing a document, to bring in evidence of what has been done since; but, at all events, it seems to me to be clear that in the present case the evidence was not admissible for that purpose; because, reading the decree in connection with the pleadings in the suit which ended in that decree, there was no ambiguity in its terms.

With regard to the second defence it was said that from modern user we ought to infer a common law prescription, or an immemorial prescription. No claim to do the acts now complained of was made by the commoners at the time of that former suit, though, if they had any such claim, it would have been most material for them to put it forth in order to see how much of the forest should be left to them. It seems to me, therefore, to be clear that no such practice existed before that decree as is now alleged, and that therefore any claim to an immemorial prescription is put an end to. It is shewn by that fact alone that the user must have commenced as a claim of right after that decree, and therefore within a known and given time.

Then as to the contention that we ought to presume a lost grant, the doctrine with regard to presumption of lost grants, is, at the present moment, the subject of much controversy. For my part, I have always been of opinion, and, until corrected, I must hold to that opinion, that if a Judge is asked to find the fact of a grant, and to say that it has been lost, he must have ground for believing that it was so. In the present case I decline to find it. It seems to me that there is no evidence upon which one ought to find that there had been a grant since the time of that decree by the owner of this property, and that such a grant has been lost.

The only remaining question is whether the Defendant has made out his defence under the *Prescription Act;* and the first point with regard to that is, what is the true construction of the *Prescription Act?* It seems to me that, in order to maintain a defence under the *Prescription Act,* those who set it up must first shew, if they set up a prescription for sixty years, that they have taken or enjoyed for sixty years a certain right, or profit, or benefit. Right in that sense means something a right to do which is claimed. In this case, therefore, what the Defendant has to shew is, first, that he and his predecessors have for sixty years taken or enjoyed the right of cutting by themselves or their servants the brake, fern, heather, and litter upon these uninclosed acres for the use of this particular farm. That is the first fact that he has to prove. The next fact, which any one who relies upon the Act has to prove, is that that right, profit, or benefit which he has so taken or enjoyed for sixty years, he has enjoyed as of right. The true interpretation of those words "as of right" seems to me to be that he has done so upon a claim to do it, as having a right to do it without the lord's permission, and that he has so done it without that permission. If he shews that he has claimed to do it, not as a thing permitted to him year by year by the lord, but as a thing that he had a right to do, whether the lord said "You may do it" or not; he has proved all that it is necessary for him to prove. When those two things have been proved the question whether the statute is applicable depends upon a pure question of law, Are those acts which have been done such that a right to do them could arise by custom or prescription or grant—not whether a right to do them was claimed as a matter of prescription or custom, or grant; but whether a right to do them could have been the subject-matter of a prescription, or custom, or grant? So that in any tribunal where the adjudication of the facts is separated from the adjudication of the law, as in the case of a trial by Judge and jury, it would be for the jury to say what were the acts done—whether they had been done for sixty years, and whether for sixty years they had been claimed to be done and done without regard to the permission of the lord. That is all they would have to find, and if they found that certain acts were done for the requisite period as of right and without permission, then, as a pure question of law, the Judge would have to decide whether such acts so done could have been the subject-matter of a custom, prescription, or grant.

Then comes the question, first of all, what are the facts which the Defendant has proved? It seems to me that where the statute is set up by a defendant, what has been done by other people or in other cases is no evidence with regard to the issue raised between the plaintiff and the defendant; that the only evidence which is admissible is evidence of what has been done by the defendant or his predecessors; and whether what was so done was done without the consent of the lord, and under a claim of right to do it without his consent, it appears to me that the Defendant here has proved that for sixty years previous to the commencement of this suit his predecessors and himself in this farm exercised the right by themselves and their servants to cut, during certain months of the year, brake, fern, heather, and litter to be used upon the farm. It seems to me that that is all that he has proved, and that he has not proved the exercise of a right to mow the grass upon this waste where there was no heather, nor of a right to cut down anything which could be fairly and reasonably called fir-trees, even of young growth. If in cutting the heather he cut what some people may call young fir-trees, that is, the shoots of a year's growth, or things which are really not noticeable and which nobody could distinguish from the heather, or if he cut grass which was growing among the heather, it would be idle to suppose that he is prevented from cutting the heather, because he may cut a few blades of grass or these very young trees. But if it is asserted that in cutting the heather he has a right to cut anything like a real growth of fir-trees, I say that has not been proved, and that he would exceed his rights if he did so.

But then it was said that even if this right was shewn to have been exercised at the commencement of the sixty years, it was not shewn that it had been exercised during the whole of that term. I think it is necessary for the Defendant to shew that the right was exercised year by year, and that if, as regards some part of the intermediate period, he failed to shew that the right had been exercised, he would not prove that which lies upon him under the statute. If, therefore, it had been shewn that he or his predecessors had for a year or more submitted to tramps or gipsies, or other people who were undoubtedly trespassers, cutting the fern on their own account and appropriating it to themselves, and instead of cutting the litter by their own servants, had bought it from those people, as something which they had a right to sell—if it could have been shewn that he had done that for a year or two years without cutting any litter during that year, or those two years, by his own servants at all, I should have thought that there was a gap made in the user for sixty years, and that he could not succeed under his plea. If he had bought from such people in each year, but also during each year had cut a part by himself and his servants under the claim of right, the mere fact of his wrongful buying from these people would not, in my opinion, have destroyed the continuity of his actual user. But I think it clear that there is no reliable evidence of the Defendant or his predecessors in title ever having bought litter from trespassers, and I think that the evidence sufficiently shews that the Defendant and his predecessors in title did by their servants cut the litter from year to year during the whole period.

Then it was said that, although the Defendant and his predecessors in title did get the litter for use on the farm during the requisite period, the Defendant's case fails, because he claimed to do it in respect of an alleged right which could not be supported in law by way of prescription, or custom, or grant; namely, that all the inhabitants of the district had a right to get in the litter.

Now, first of all, I do not think that he did make the claim in that form. But, secondly, it seems clear to me upon the construction of the statute, that if he had done so it would have made no difference. His claiming to exercise the right, which he did in fact exercise, in respect of some alleged title, which could not be supported, is, in my opinion, wholly immaterial, because, as I have said, the only question is, when the fact of enjoyment has been proved, whether a right to do the acts complained of was capable of being supported by prescription, or a custom, or a grant, if such had been proved. Therefore, that objection seems to me to fail. If it had been shewn that the Defendant and his predecessors had not only taken litter to be used on their farm, but had taken litter for the purpose of selling it—if their actual user, therefore, had not been merely the taking of the litter for the use of the farm, but the taking of litter generally, although part of it was used on the farm, then I think we should have had to consider at all events the ruling of the Master of the Rolls in *Hammerton* v. *Honey* (1). In such a case, to allow a right to be established to take litter for the use of the farm would be what I should call taking only part of the claim, and I should be inclined to think that if that had been the user proved, the claim to take litter in respect of the farm could not have been supported. But if all that was taken was taken for the use of the farm, then the assuming to take it under an erroneous view, or in respect of an erroneous claim, seems to me immaterial.

It was then said that the litter was taken because the Defendant and his predecessors were of opinion that they had a right to do so under the words of the decree, and that that view was erroneous. For the same reason, if they so claimed it, and perhaps they did, that seems to me to be immaterial. Therefore I think that the user has been established, and I think it is clear that the Defendant and his predecessors, whatever view they took of their rights, at all events assumed to take litter as a matter of right whether the lord permitted them or not, and in my opinion the view they took of their right is not material.

Then comes the question—could such a right be the subject-matter of a grant? In my opinion, clearly it could, as a matter of law. Therefore the defence under the *Prescription Act* is made out.

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(1) 24 W. R. 603, 604.

There was some discussion as to the frame of mind with which a Judge should come to the contemplation of a claim made under the *Prescription Act;* and there seems to be considerable authority, *dicta* at all events by learned Judges sitting in the Court of Chancery, that where the facts of user are proved, the Court ought to be astute to discover some legal mode in which the claim of right might be maintained, that is to say, that the Court ought to lean heavily in favour of the defence of a prescription under the statute. Now, if by that it is meant that the Court ought to look at the evidence with extreme indulgence, I beg leave to say that I cannot accede to that view. It seems to me that there is nothing so dangerous as to lay down, as if it were matter of law, a mechanical rule for dealing with matters of evidence and of fact. Where the *Prescription Act* is vouched in order to maintain that which one really believes to have been a true right, although the evidence of it may be wanting, I should be inclined, and I should certainly advise a jury, to look at the evidence with considerable indulgence. But if one was of opinion that the statute is vouched in order to create a right which one believes did not really exist, I should myself act upon this view, and I should advise a jury to act upon the same—to look at the evidence with considerable strictness. But here, looking at it in what way you will, it seems to me that the evidence fairly considered is conclusive as to the user; that such user may be the subject of a valid right, such as is described in the statute; and that the Defendant's defence in the 15th paragraph is therefore made out; and that although all his other grounds of defence have failed, this appeal must be allowed.

COTTON, L.J.:—

This is an action of trespass, and the alleged acts of trespass complained of are cutting heather and fern for the purpose of carrying them away to be used as litter on a farm called *Suntings.* The question is whether the Defendant, by any of the defences he has raised, has justified the acts complained of.

In my opinion the only defence upon which the Defendant has succeeded, is that raised by the 15th paragraph of his statement of defence, in which he alleges that these acts of alleged trespass have been done by him and his predecessors in title in respect of the farm of *Suntings* for upwards of sixty years.

Of course, the first question to be decided, which the Vice-Chancellor seems to have decided in favour of the Plaintiff and against the Defendants, is this—whether that is such a defence as in this case was capable of being raised. The Vice-Chancellor's view was that it was not capable of being raised.

It was said that, in order to bring a case within the statute, it must be shewn that the same right which the statute will support has been vouched in support of the acts which have been done, and it is said here, that these acts, if they are made out in fact to have been done for sixty years, were done, not under what the Court thinks would give a good defence, but as under a custom which the Court holds incapable of proof and not proved. Now I quite agree with what Lord Justice *Brett* has said, and I shall be very short therefore in my observations upon the statute. What the statute requires is this. You must see whether the acts which the Defendant claims a right to do in the suit are such as could be supported as lawful by custom, prescription, or grant; and then you must see whether the acts have been done as of right, that is to say, not secretly, not as acts of violence, not under permission from time to time given by the person on whose soil the acts were done. I say "from time to time given," not that it should necessarily be yearly, but from time to time during the period the exercise during which is said to establish the right; because if there has been permission before that time, if the time is sixty years, that is not sufficient to prevent the Defendant from establishing his claim unless it has been by consent or by agreement in writing. That is expressly provided by the 1st section of the statute. But, in my opinion, if there is permission from time to time given and accepted during the period relied upon, that does prevent (what in my opinion is essential) the acts being done as of right; and I may also say, because it bears upon the present case, that it must be shewn that the acts were done in respect of some tenement owned by the Defendant and his predecessors in title.

What we have to consider here is, first of all, whether the acts of the Defendant have in fact been done by him and his predecessors in title for the period of sixty years. [His Lordship considered the evidence, and stated his conclusion to be that a cutting of litter for the purposes of the farm had been continuously exercised by the Defendant and his predecessors in title for sixty years down to the commencement of the action, and that this was done as of right without any regard to permission by the lord.]

It is said, however, that nearly all the persons who cut litter did it, not in respect of their own particular farms, but under a general supposition that the decree gave them a right to do so, or that there was some custom which justified it. In my opinion, as I have already said, it is not necessary under the statute that the acts done should at the time have been attempted to have been justified in a way in which we think they can legally be justified, if the person doing them was claiming to do them as of right. What particular right the persons doing the acts alleged, unless there was permission from time to time given by the lord, in my opinion is not material under the statute. But, no doubt, it must be shewn that the acts of the Defendant are acts of user in connection with his particular tenement; and that, I think, is shewn, because what is proved in respect of this Defendant and his predecessors in title is, that they cut the litter in respect of and for the use of their farm only; and as that was so, the right was exercised in respect of that tenement, and is connected with the tenement, *i.e.* with the possession and occupation of the tenement and the ownership of the tenement. That, in my opinion, entirely distinguishes the case from two cases on which the Plaintiff relied and to which I am going to refer. One was the case of *Blewett* v. *Tregonning* (1), and all that was laid down was to this effect: "It must be pointed out to the jury that they must be satisfied that the occupiers of the farm enjoyed the privilege because they were occupiers, and that the right was attached to the farm." However much other persons who have no right claimed to cut litter, and although there was a general supposition that this right was given by the decree, or possibly that nobody could or would be interfered with who cut it, or that there was a custom in the district to cut it, yet when we find that Mr. *Hale* and his predecessors in title cut it for the purpose of carrying it off to *Suntings*, and there used it, and only cut what they required for the purposes of that farm, in my opinion the acts done are connected with the farm, and can be given in evidence in support of the claim under the *Prescription Act.* The other case, which at first sight seemed more in favour of the Respondents, was the case of *Hammerton* v. *Honey* (1). In that case what was attempted to be asserted was a claim of all the inhabitants of a village to use a green for the purpose of recreation. The evidence given was that all people, whether of the village or not, had used it; and it was held that this evidence would not support a claim of right in respect of the inhabitants of that village. Some of the persons who used it happened to be inhabitants of the village, but there was no distinction at all as between their user and that of all the rest of Her Majesty's subjects, and therefore the user by all Her Majesty's subjects as such, the villagers not using it as villagers but as Her Majesty's subjects, did not afford any evidence in support of the claim sought to be established. Therefore that case, in my opinion, does not support the contention of the Respondents in the present case.

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(1) 3 Ad. & E. 554.

As to the claim under the decree of 1693, I quite agree with the view of the Vice-Chancellor and of the other Lords Justices. The decree of 1693 does not in terms give the Defendant and the other commoners the right which he claims here, and in my opinion it does not, upon its true construction, give it them; nor do I consider the words of the decree in any way ambiguous. The decree is founded upon the report of the Commission. The Commissioners recommended that the commoners should have the 6400 acres for common of pasture and herbage, and that the lord should not be allowed to turn out any cattle there. What the lord is excluded from shews what the commoners were to have. Then, when we come to the words in the latter part of the decree which were relied upon, and alone give foundation for the argument, "sole common pasturage and herbage," which it was said was something different from common of pasture, we must construe those words fairly by looking at the whole of the decree; and when we consider how the Commissioners' report as regards

(1) 24 W. R. 603.

the lord is construed, we find that "common of pasture" is used for just the same as common pasturage; in fact, in the one case common is used possibly improperly as a substantive, and in the other possibly properly as an adjective; for the lords are excluded by the decree from claiming any common of pasture or herbage upon the said land. In my opinion, upon the true construction of the decree, all that is given over these 6400 acres to the commoners is common of pasture in the ordinary sense of those words; and we cannot, in my opinion, properly construe those words of the decree by any reference to usage subsequently to the date of the decree.

There is only one other matter, namely, the user alleged to be proved before the date of that decree. To go through the various documents which were referred to on that point would take a great deal of time. In my opinion, the Vice-Chancellor was quite right in the conclusion at which he arrived, that there was not any evidence from which the Court ought to draw the conclusion that the commoners had previously to that decree the right of cutting the litter and fern as in manner claimed here by the defence.

I must say one word as regards another matter. The Defendant has claimed very largely in his statement of defence a right to exclude the lord from any interest, not only in the litter and herbage, but also in the young seedlings. Now it does not appear here that what has been done by the Defendant has included the cutting of seedlings; but, in my opinion, all that he is justified in doing is this,—cutting the litter. I consider that he will not be answerable for anything which he unavoidably does in cutting the litter; but, that he has no right at all to destroy trees as trees, or to destroy seedlings, if in cutting the litter, which, in my opinion, he has a right to do, he can avoid cutting and destroying those seedlings and trees.

James, L.J.:—

I think it right to add that I am not at present prepared to say that the evidence as to the other farms was not admissible by way of reply to the case of the Plaintiff, that the Defendant was only one of a mob of trespassers and wrongdoers, which was the case

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the Plaintiff opened; I think also that it requires some further consideration before we entirely adopt what was said in one of the cases,—that to establish under the statute a claim to a *profit à prendre*, it must be shewn to have been exercised in every one of the years. If from any accident, or if merely for the convenience of the man himself, the right was in some years not exercised, I think it deserves consideration whether such a pretermission as that would defeat the right if the user was shewn to have begun more than sixty years ago, and to have continued whenever it was wanted during the whole sixty years.

Solicitors for Plaintiff: *Cope & Co.*
Solicitors for Defendants: *Horne, Hunter, & Birkett.*

H. C. J.

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[1879 R. 200.]

Unregistered Company—Application of Part IV. of Companies Act, 1862, *to Unregistered Companies—Companies Act,* 1862, ss. 85, 199, 201, 204—*Judgment against Company after Petition to wind up—Practice—Costs as between Defendants.*

W. being entitled to the money payable on a policy of insurance on the life of his wife, who had lately died, assigned it to *R.* *R.* brought an action against the insurance company, which was an unregistered company, and *W.*, to recover the money. The company paid it into Court. The Plaintiff applied by summons to have it paid out to her, and to have her costs taxed and paid by the company; and *W.* took out a summons for payment of his costs. On the 6th of August, 1880, an order was made for payment of the money to the Plaintiff, and for payment of her costs by the company; and all proceedings were stayed, except on *W.'s* summons, which was adjourned. The Plaintiff's costs were taxed and paid. In October, 1880, two petitions were presented for winding up the company. On the 3rd of December, 1880, *W.'s* summons was heard, and the Vice-Chancellor ordered the Plaintiff to pay *W.'s* costs, and ordered the company to repay the Plaintiff what he should so pay, no objection being taken by the company on the ground of the pendency of the winding-up petitions, although the claim was resisted on other grounds. The Plaintiff paid *W.'s* costs, and applied to the company for repayment, which was refused; and the company applied in the action to restrain the Plaintiff from issuing execution for these costs. The winding-up petitions were still pending, and no order for winding up had been made:—

Held, by *Bacon*, V.C., that the company being unregistered, and no winding-up order having been made, sect. 85 of the *Companies Act*, 1862, did not apply; and that there was no jurisdiction to make the order.

Held, by the Court of Appeal, that where proceedings are pending for winding up an unregistered company, all the provisions of Part IV. of the *Companies Act*, 1862, other than those expressly excepted, are applicable; and that, under sect. 85, the Court had jurisdiction to make the order asked for; the direction in sect. 204, that "an unregistered company shall not, except in the event of its being wound up, be deemed to be a company under this Act," not being intended to confine the application of the Act to a company which has been actually ordered to be wound up:

But *held*, that as the company had allowed the order of the 3rd of December, 1880, to be made without raising the objection that the pendency of the winding-up proceedings made such an order improper, and had lain by till that order could not be appealed from, the Court ought not now to exercise in their favour the discretionary power to stay proceedings which is given by sect. 85.

In cases where under the old practice in Chancery the Court would have ordered the plaintiff to pay the costs of one defendant and have them over against another defendant, an order will now be made at once for the one defendant to pay them to the other.

THIS was an action to recover £100 on a policy of assurance effected by the Defendant *Würth* with the *Great Britain Mutual Life Assurance Society* on the life of his wife. The wife died on the 3rd of April, 1878, and the sum assured became payable on the 15th of July. *Würth* being in immediate want of money, made an equitable assignment of the policy to the Plaintiff, Mrs. *Rudow*. The Plaintiff, on the 28th of July, 1879, commenced her action against the society to obtain payment, making *Würth* a Defendant. The statement of claim was delivered on the 25th of October. Notice of trial was served on the 3rd of July, 1880, but the action never came on for trial, the society having paid the money into Court. The Plaintiff applied by summons to have the money paid out to her, and to have her costs taxed and paid by the society; and *Würth* took out a summons to have his costs taxed and paid. On the 6th of August, 1880, an order was made for payment of the money in Court to the Plaintiff, and for taxation of her costs and payment of them by the society; and all further proceedings were stayed, except on the summons by *Würth*. The money was accordingly paid out to the Plaintiff, and her costs of the action were taxed and were paid on the 8th of November, 1880.

On the 21st of October, 1880, a petition was presented to wind up the society, and on the 30th of October another petition was presented for the same purpose. On the 19th of November, 1880, Vice-Chancellor *Hall* made a winding-up order on these petitions; but the Court of Appeal, on the 24th of the same month, discharged this order and directed the appeal to stand over till the Hilary Sittings, to ascertain the wishes of the policy-holders (1).

On the 3rd of December, 1880, *Würth's* summons, which had been adjourned into Court, came on before Vice-Chancellor *Bacon*, and his Lordship ordered the Plaintiff to pay to *Würth* his taxed costs of the action, and gave her liberty to add what she so paid to her own costs; and it was ordered that the society should pay to the Plaintiff her costs not already taxed of the action, including what she should so pay to *Würth*, such costs to be taxed by the Taxing Master. The costs of the Plaintiff and *Würth* of the application and consequent thereon to be costs in the action.

On the 19th of January, 1881, an order was made by the Court of Appeal referring it to Chambers to settle a scheme for the reduction of the contracts, and directing the petitions to stand over, and continuing a provisional liquidator who had been appointed till further order.

The taxation of *Würth's* costs was completed on the 22nd of January, 1881. The Plaintiff paid them, and on the 29th of January, 1881, applied to the solicitors of the society for payment of them. The society objected to pay, on the ground of the winding-up proceedings, and applied in the action for an injunction to restrain the Plaintiff from issuing execution for the costs directed by the order of the 3rd of December, 1880, to be paid by the society to the Plaintiff.

The motion came on for hearing before Vice-Chancellor *Bacon* on the 18th of March, 1881.

Hemming, Q.C., and *Speed*, for the motion.

Marten, Q.C., and *Pugh*, for the Plaintiff, took the preliminary objection that there was no jurisdiction to make the order.

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(1) 16 Ch. D. 246.

Part VIII. of the *Companies Act*, 1862, headed "Application of Act to unregistered Companies," begins with sect. 199, which provides that "subject as hereinafter mentioned" unregistered companies may be wound up. Sect. 201 gives power to the Court, at any time after the presentation of a petition for winding up an unregistered company and before order, "upon the application of any creditor," to stay proceedings in any action against the company.

This being an application not by a creditor but by the society, sect. 201 cannot apply; and the only section under which the Court could act would be the 85th section. But the 201st section is clearly substituted for the 85th in the case of unregistered companies, and the 85th section has no application. Accordingly the Court has no jurisdiction to stay the action. [They cited *In re Great Ship Company* (1), and referred to the last part of sect. 204.]

Moreover, as the scheme was then in full operation, the winding-up application was practically at an end, for the power of reducing contracts was a statutory substitution for a winding-up order: *In re Great Britain Mutual Life Assurance Society* (2). They contended they were restored to the position in which they were on the 3rd of December, 1880.

Hemming, Q.C., and *Speed*, *contrà*:—

We concede that the power which we ask the Court to exercise is conferred only by the 85th section. That power was given in order to enable the Court in all cases to have the assets properly distributed, and to prevent a creditor getting himself preferred.

The power conferred by the 85th section is a general power which is not cut down by any subsequent section. The 199th section, which makes certain special provisions in the case of unregistered companies, expressly says, subject to certain exceptions which do not apply to this case, "All the provisions of the Act with respect to winding-up shall apply to such company." This saves the 85th section. It has been argued as if the 201st section took away the general power conferred by the 85th. But that is not so; for the 204th section says that the provisions made by this part of the Act are to be deemed as made "in addition to

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(1) 4 D. J. & S. 63. 16 Jur 253

(2) 16 Ch. D. 252.

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and not in restriction of any provisions hereinbefore contained with respect to winding up companies by the Court." The intention of the 201st section is explained by Lord Justice *Turner* in *In re Great Ship Company* (1).

This company has been ordered to be wound up, and though that order has been discharged, the petitions are still pending. So that this company, though unregistered, is in course of winding up, and is to be deemed a company under this Act.

BACON, V.C.:—

I think this preliminary objection is irresistible.

No one can fail to see the distinction between a registered and an unregistered company. The 85th section of the Act applies to registered companies. After the presentation of a petition to wind up a registered company the creditor has an interest, and the company has an interest, and by the 85th section the Court has jurisdiction, on the application of either party, to restrain the other from prosecuting that interest by action or suit, upon such terms as the Court may think fit. That provision is intended for registered companies.

An unregistered company stands in a different situation. The Act does not relieve an unregistered company, nor does it mean to do so. The 199th section provides that, "subject as hereinafter mentioned," any partnership, association, or company, consisting of more than seven members, and "not registered under this Act," may be wound up, and that all the provisions of the Act with respect to winding up shall apply to such company. Then the 201st section gives power to any creditor (not to the company) to apply to the Court to restrain proceedings in any action or suit against any contributory of the company, or against the company itself. Plainly, in order that any creditor who sees the assets of the company being dissipated, may stay proceedings against the company, and enable all parties to start fair, and see that the assets are evenly distributed. Then the 204th section provides that the provisions made with respect to unregistered companies shall be deemed to be made "in addition to, and not in restriction of any provisions hereinbefore contained" with regard to the

(1) 4 D. J. & S. 63, 69. 10 Jur. N.S. 3, 4

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winding-up of companies. But by the same section an unregistered company is not, except in the event of its being wound up, to be deemed "a company under this Act, and then only to the extent provided by this Act;" that is to say, an unregistered company is not, except for the purpose of being wound up, a company under the Act of 1862 at all.

The facts are perfectly plain. In August, 1880, an order was made in this suit for the payment to the Plaintiff of a fund in Court, and her costs, which were to be taxed, were to be paid by the company. Then a petition was presented in another branch of the Court for the winding-up of the company, upon which an order was made, but the order was afterwards discharged by the Court of Appeal, though the petition was not dismissed. Subsequently an order was made in this action that the Plaintiff should pay a co-defendant certain costs and recover them over from the company. There is no longer a winding-up pending. For a winding-up has been substituted a reference as to a scheme for reducing the liabilities of the company. Practically the winding-up does not exist; there is nothing in it to be done; what is on foot is this scheme whereby the amount of the company's contracts is to be reduced. Then the Plaintiff, who, so long as the company, being unregistered, remains unwound up, and is not to be deemed a company under the Act of 1862, has a right to proceed with her action, seeks to have the order of the 3rd of December enforced for her benefit. The company ask the Court to assist them in resisting the Plaintiff's claim, and the Plaintiff objects that the Court has no jurisdiction to interfere. In my opinion, there is no answer to the Plaintiff's objection; and this motion must be refused with costs.

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The society appealed. The appeal was heard on the 13th of April, 1881.

Coram, JAMES, BRETT, and COTTON, L.JJ.

Hemming, Q.C., and *Speed*, for the Appellants:—

Before the Judicature Acts such an order as we asked for was commonly made in the winding-up; it must now be applied for in the action. As to the jurisdiction, we say that the Court has jurisdiction to deal with its own action and to make an order which before the Acts would have been made as of course in the winding-up. The Vice-Chancellor has held that this is not a company under the Act, and that therefore there is no jurisdiction. But by sect. 199 an unregistered company can be wound up under the Act, and except so far as thereby excepted, the provisions applicable to other companies are to apply to all winding-up proceedings in relation to such a company. The Vice-Chancellor relies on sect. 204 as excluding an unregistered company, but to construe that section in the way his Lordship has done involves a contradiction, for if an unregistered company is not a company within the Act for any purpose until it is ordered to be wound up, there can be no jurisdiction to entertain any proceedings preliminary to winding it up. There would be no jurisdiction even to hear a petition, and no winding-up order could be made. The words in sect. 199, "All the provisions of this Act with respect to winding-up shall apply to such company," must mean all the provisions in Part IV. which come under the heading of "Winding-up of Companies and Associations under this Act," otherwise there will be great difficulty in sorting the clauses of that part and saying which of them are to apply to unregistered companies.

[COTTON, L.J.:—Does not sect. 204 mean that a company is not to be treated as a company under this Act unless an order is made for winding it up?]

I say that it means except in the event of proceedings being pending for winding it up.

[COTTON, L.J.:—Does not sect. 201 appear to shew that Part IV. is not imported to the extent you contend?]

My reading of sect. 199 makes everything harmonious, and if this be the right view, the Court can exercise the powers given by sect. 85 to prevent the property from being wasted before the Court can get it.

[BRETT, L.J.:—According to your view, what need was there for sect. 201?]

It is, in part, superfluous, but it gives further powers than the

Court would have without it. It gives power to restrain proceedings against any contributory.

[BRETT, L.J.:—But according to your construction, the words "or against the company" are superfluous.]

The section ought not to be treated as abridging the powers of the Court. It might do so if it stood alone, for we admit the words "or against the company" to be superfluous; but sect. 204 shews that the powers were intended to be cumulative. The Act will not work if an unregistered company is not within the Act till a winding-up order is made. How is a petition to wind it up to be entertained?

[JAMES, L.J.:—Probably the Vice-Chancellor means that it was not within the Act except for the purpose of proceedings to wind it up and proceedings under the winding-up.]

It would be very inconvenient if the powers of protecting the property pending the winding-up proceedings were not included, for they are essential to make the winding-up effective.

[COTTON, L.J.:—It is in your favour that in sect. 199, sub-sect. 2, it is provided that no unregistered company shall be wound up voluntarily or under supervision, which may be argued to imply that but for that provision they could be so wound up.]

If sect. 85 cannot be imported, then there is no reason for importing the provisions as to a provisional liquidator, which are of great importance. The Court of Appeal (1) held that sect. 91 was imported, and there is no reason for importing that section which does not apply equally to sect. 85.

April 26. *Coram*, JESSEL, M.R., and COTTON and LUSH, L.JJ.

Hemming, Q.C., for the Appellants, having argued the preliminary question on the same grounds as on the former day, the Court expressed an opinion that the decision of the Vice-Chancellor as to the jurisdiction could not be maintained, and that they would hear the case on the merits.

Hemming, Q.C., and *Speed*, for the Appellants:—

[JESSEL, M.R.:—I think it right to state, for I have the concurrence of the Lords Justices, that under the Judicature Acts it is no longer necessary or proper to order a plaintiff to pay the costs of a defendant and have them over against another defendant, so that if the second defendant is insolvent the plaintiff loses them. The proper form of order now is to order the defendant who is liable to them as between himself and his co-defendant to pay them to the co-defendant.]

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(1) 16 Ch. D. 246.

If a plaintiff gets judgment against a company and issues execution, he must get his writ into the hands of the sheriff before a winding-up petition is presented. If he does not he will be restrained from proceeding until it is seen what becomes of the petition, and if a winding-up order is made he will be absolutely restrained from execution.

[JESSEL, M.R.:—You are under this difficulty: that you let the order of the 3rd of December, 1880, be made, under which the Plaintiff incurred a liability, and you thus altered his position.]

It does not seem that we assented to the order. From what appears we seem to have resisted it on other grounds. All that can be said is that there was a point which we did not take.

There is no case where the Court has allowed execution to issue pending a winding-up petition, unless where the company had induced the creditor to delay and taken advantage of that to get a petition on the file. The cases are given in *Buckley* on Joint Stock Companies Act (1).

[JESSEL, M.R.:—Have you any case where the creditor has been restrained if the judgment has been obtained after the presentation of the petition. No doubt the general rule is as you say, but it does not follow that you can take the benefit of it if you let an action go on to judgment after the presentation of the petition.]

In *In re Williams* (2) judgment was signed after the winding-up petition, yet the creditor was restrained.

[JESSEL, M.R.:—The cases are before the *Judicature Act*, when a winding-up petition was no defence in the action. It now is a defence, and if a company does not take it, but allows the plaintiff to go on and alter his position, the company cannot afterwards raise it.]

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(1) 3rd Ed. pp. 186, 187.

(2) 8 Ch. D. 192.

In re Williams (1) was since the *Judicature Act.*

[JESSEL, M.R.:—In that case there was no adverse litigation after the presentation of the petition. Nothing took place in the action after the presentation of the petition except the mere formal signing of judgment.]

Marten, Q.C., and *Pugh*, for the Plaintiff, were not called upon.

JESSEL, M.R.:—

This is an application by way of appeal from an order made by Vice-Chancellor *Bacon*, refusing, with costs, an application to stay proceedings on an order in the nature of a judgment to pay costs to the Plaintiff in the action. The action was brought by the holder of a policy for £100 against the company. The company appears to have had no defence to the action, but there was a suggestion that some one else claimed the money. In the result, and before any proceedings were had in the winding-up, the company paid the money into Court, the Plaintiff took the money out of Court and applied for the costs of her action, and an order was made for payment of her costs of the action, which have been duly taxed and paid. But it appeared that the holder of the policy had mortgaged the policy, or rather the claim upon it (for it was after the death of the insured), to the Plaintiff, and therefore the mortgagor, a person of the name of *Würth*, was made a defendant to the action, and when the Plaintiff, having taken the money out of Court and being satisfied, got an order for her costs, *Würth* applied for his costs to be provided for on the ground that he was a necessary party to the action. This was disputed by the company, and in consequence, although an order was made upon the company to pay the Plaintiff's costs of the action, no order was then made as to the payment of *Würth's* costs, and they stood over to a subsequent period. In the meantime a petition was presented for winding up the company, and an order was made for winding up which was subsequently discharged by the Court of

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(1) 8 Ch. D. 192.

Appeal, and the petition is still pending. After this order had been made by the Court of Appeal, the petition being then pending, *Würth's* summons came on to be heard before Vice-Chancellor *Bacon* on the 3rd of December last, and on that occasion the company did not take the objection that the pending of the petition for winding up was an answer to *Würth's* application, but allowed an order to be made to this effect, that the Plaintiff should pay *Würth's* costs and have them over again against the company, and that order is not now appealable, having been made on the 3rd of last December.

The result, therefore, was, that by virtue of that order the Plaintiff became liable to pay *Würth's* costs in full and was to have them over against the company. The order employed the machinery which was adopted by the old Court of Chancery and which is no longer either necessary or useful, but is mischievous, and, as this Court has already laid down to-day, is no longer to be used.

That being the position of matters, the Plaintiff was liable to pay, and has paid, *Würth's* costs in full; and if this application were to succeed, and a winding-up order were eventually to be made on the petition against the company, she would only get a dividend on the costs she has paid to *Würth*. Of course that would be doing the Plaintiff a great injustice. She would not have agreed to or allowed the order to go to make her liable to pay costs to *Würth*, except on the condition that she was to be indemnified by being paid over again the same sum by the company; and therefore, by allowing that order of the 3rd of December to go, her position has been materially changed, and changed by whose act? By the act of the company. The company was entitled under the 24th section of the *Judicature Act*, 1873, sub-s. 5, to say that every matter of equity on which an injunction against the prosecution of any such proceeding might have been obtained if that Act had not passed might be relied on by way of defence thereto, and consequently might have objected to the order going, or the company might have applied under the latter part of the same sub-section for an order to stay proceedings. But they did neither, and allowed the litigation to proceed to judgment on the 3rd of December, in the way I have mentioned, and then afterwards, the time for appealing against that order having expired, they apply to restrain the Plaintiff, who has paid *Würth*, from proceeding to execution on the order she has obtained to indemnify herself by being repaid the amount she has paid.

It is manifest that if the Court has a discretion, it ought not to exercise the discretion in favour of the company, but in favour of the Plaintiff. Now, under the *Companies Act*, 1862, sect. 85, it clearly is not obligatory on the Court to make the order, but the Court has a discretion which has been repeatedly exercised. I admit there must be some judicial grounds for its exercise, but in this case the position of the Plaintiff has been so changed by the action of the company, that it would not, in my opinion, be just to allow the company now to restrain proceedings on this judgment.

I must, however, say that I cannot accede to the ground upon which the Vice-Chancellor decided this case. He did not decide it on the merits, but considered that as this was an unregistered company, the Court had not jurisdiction to make the order asked. It is necessary only to look at a few sections of the Act of Parliament to see that the Court had jurisdiction. The 85th section is general. "The Court may at any time after the presentation of a petition for winding up a company under this Act . . . restrain further proceedings in any action, suit, or proceeding against the company." Then the 199th section says, that any unregistered company, subject to certain restrictions, may be wound up under the Act, and that "all the provisions of this Act with respect to winding up shall apply to such company," with certain exceptions and additions which I need not read for this purpose. Therefore, there is a general rule that subject to what follows all the provisions of the Act with respect to winding-up shall apply. That, of course, if it stood alone, would import the 85th section. Then the 201st section says that "the Court may at any time after the presentation of a petition for the winding up an unregistered company, and before making the order for winding up the company, upon the application of any creditor of the company, restrain proceedings in any action, suit, or proceeding against any contributory of the company or against the company." That 201st section was necessary, because in the case of an unregistered company a creditor might sue a contributory as well as the company. The 85th section in terms applies only to a registered company, and authorizes the making an order on the application of the company, or a creditor, or a contributory. The 201st section does not empower the Court to make an order on the application of the company, but on the application of a creditor only, and it restrains proceedings against the contributory or company. The order to be made is for a different purpose, and on the application of a different person, from the order mentioned in sect. 85, and, standing alone without the subsequent section, which I am going to mention, I think this section would still be held not to interfere with the application of the 85th section. But any question on that part of the Act is got rid of by the provisions of the 204th section, that "the provisions made by this part of the Act with respect to unregistered companies shall be deemed to be made in addition to and not in restriction of any of the provisions hereinbefore contained with respect to winding up companies by the Court." Therefore, it is quite plain that so far the 85th section is made applicable to an unregistered company. But there are, at the end of the section, these words, upon which the Vice-Chancellor relied, that "an unregistered company shall not, except in the event of its being wound up, be deemed to be a company under this Act, and then only to the extent provided by this part of this Act." His Lordship read "being wound up" as if it had been "having been wound up," which would make the Act absolutely unworkable. It is necessary that the provisions anterior to the actual order for winding up should apply to an unregistered company, and that he seems to have forgotten. It is plainly the meaning of the Act that all the provisions of Part IV. shall apply as much to unregistered companies as to registered companies.

It appears to me, therefore, that the order made by the learned Vice-Chancellor ought to be affirmed, though not for the same reasons which he gave in pronouncing it.

BAGGALLAY, L.J.:—

I am of the same opinion. I am unable to agree with the view taken by the Vice-Chancellor, that he had no jurisdiction to make such an order as was asked in this action. It appears to me that the 5th and 6th sub-sections of sect. 24 of the *Judicature Act*, 1873, gave ample jurisdiction to the Vice-Chancellor in whose branch of the Chancery Division the action was pending.

As regards the merits of the case I have but very few observations to make. In October, 1880, two petitions were presented for the winding-up of the Defendant company. On the 19th of November last a winding-up order was made, and on the 24th of the same month this Court discharged that order, but retained the petitions as pending petitions for winding up, and postponed the further hearing of the appeal until the wishes of the policyholders could be ascertained. That having been the state of things as established on the 24th of November, on the 3rd of December, in the presence of the Plaintiff and the two Defendants to the action, an order was made that the Plaintiff should pay the Defendant *Würth's* costs, and that the Defendant company should pay to the Plaintiff what the Plaintiff should so pay to the Defendant *Würth*. All the parties interested were before the Court, and the facts were known, or must be presumed to have been known, to the parties. There having been no appeal against the order of the 3rd of December, 1880, we must assume that order to have been properly made, and to be binding between the parties. The winding-up proceedings which were pending when the order of the 3rd of December was made are pending still, so if the order which was made by the Vice-Chancellor on the 3rd of December was then right, why should it be wrong now? If we assent to the application of the present Appellant, it can only be on some ground which is inconsistent with the order made on the 3rd of December. It appears to me, therefore, that the appeal should be dismissed.

LUSH, L.J.:—

I am of the same opinion on both points, and as regards the merits I think it would be most unjust to accede to the application which was made to us. The order of the 3rd of December, 1880, was merely the machinery by which *Würth's* application was acceded to. Instead of making an order, which I quite agree is the proper one now to be made, for the company to pay *Würth's* costs, the Court adopted the old practice, and ordered the Plaintiff

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to pay *Würth* in the first instance and the company to repay the Plaintiff. It would be most unjust after the Plaintiff had paid those costs to prevent her from having her remedy over. The company might, if they chose, have prevented the making the order in the form in which it was made, and having let that opportunity slip they have entirely altered the position of the Plaintiff, and it would be most unjust to prevent the Plaintiff from having recourse over for the repayment of the costs which she has had to pay. Therefore the appeal will be dismissed with costs.

Solicitors for Plaintiff: *Greenfield & Abbott.*
Solicitors for Company: *Prideaux & Sons.*

H. C. J.

DAWKINS *v.* ANTROBUS.

[1879 D. 81.]

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Club—Power of Expulsion of Member—Validity of Rule—Conduct injurious to Character and Interests of Club—Bona fides—Irregularity—Interference of Court.

The Court will not interfere against the decision of the members of a club professing to act under their rules, unless it can be shewn either that the rules are contrary to natural justice, or that what has been done is contrary to the rules, or that there has been *mala fides* or malice in arriving at the decision.

One of the rules of a club provided that a general meeting might alter any of the standing rules affecting the general interests of the club, provided this was done with certain formalities and by a certain majority:—

Held, that a rule providing for the expulsion of members who should be guilty of conduct injurious to the interests of the club was within the regulation, and could be validly passed by a general meeting.

One of the rules of a club provided that in case the conduct of any member should, in the opinion of the committee, be injurious to the character and interests of the club, the committee should be empowered to recommend such member to resign, and if he should not comply, the committee should then call a general meeting, and if a majority of two-thirds of the meeting agreed by ballot to the expulsion of such member, he should be expelled.

The Plaintiff, a member of the club, sent a pamphlet which reflected on the conduct of *S.*, a gentleman in a high official position, also a member of the club, to *S.*, at his official address, enclosed in an envelope on the outside of which was printed "Dishonourable Conduct of *S.*" The committee being of opinion that this action was injurious to the character and interests of the club, called upon the Plaintiff for an explanation, which he refused to give. They then called on him to resign, and as he did not comply with their recommendation, they duly summoned a general meeting, at which a resolution was passed by the requisite majority expelling the Plaintiff from the club:—

Held (affirming the decision of *Jessel*, M.R.), that the Court would not interfere to restrain the committee from excluding the Plaintiff from the club.

The fact that a decision is unreasonable may be strong evidence of malice, but is not conclusive, and may be rebutted by evidence of *bona fides*.

THE action in this case was brought by Colonel *Dawkins* against the trustees and committee of the *Travellers' Club*, claiming a declaration that a resolution purporting to expel him from the club was invalid, and an injunction restraining the Defendants from excluding the Plaintiff from the club, and from interfering with him in the enjoyment of the use of the buildings and property of the club.

The Plaintiff was elected a member of the club in the year 1859.

Among the rules of the club at the time when the Plaintiff joined it were the following:—

"13. That the regulations for dinner, refreshment, and other details of conducting the establishment be vested in the committee, but that any alteration in the number of members or standing rules of the club be decided by a majority at a general meeting at which at least forty members must be present, to be summoned by the committee for that purpose, giving at least fourteen days' notice.

"25. That at all general meetings of the club the votes of the meeting shall be first taken by shew of hands or division, provided there be forty members present, the majority to decide; but if a ballot be demanded by six members present, the proposition in debate shall be postponed until the following day, when the ballot shall be taken between the hours of three and six o'clock, or if forty members shall not be present, the proposition shall be decided the same day by ballot between the time of the adjournment of the members and six o'clock. In all cases of ballot, two thirds of the members voting to decide.

"27. That no proposition affecting the general interests of the club shall be brought forward at any general meeting without a week's notice in writing signed by six members and communicated to the secretary, and placed by him in the room."

On the 31st of May, 1875, a rule was passed at a general meeting of the club providing for the expulsion of members, in nearly the same terms as those of rule 26, hereinafter mentioned, but doubts having arisen whether the requisite number of forty members were present at the meeting, another general meeting was held on the 16th of August, 1877, in the manner prescribed by the 13th rule, at which the following rule was passed by the requisite majority, more than forty members being present:—

"Rule 26. In case the conduct of any member, either in or out of the club-house, shall in the opinion of the committee, or of any twenty members of the club, who shall certify the same in writing, be injurious to the character and interests of the club, the committee shall be empowered (if they deem it expedient) to recommend such member to resign, and if the member so recommended shall not comply within a month from the date of such communication being addressed to him, the committee shall then call a general meeting, and if a majority of two-thirds of that meeting agree by ballot to the expulsion of such member, his name shall be erased from the list, and he shall forfeit all right or claim upon the property of the club, but his subscription for the current year shall be returned to him."

The rules were afterwards revised by a committee, and the rules as revised were submitted to a special general meeting on the 24th of June, 1878, at which forty members were present, and, with slight verbal amendments, were carried unanimously. Rule 26 was one of the rules as revised, and no exception had been taken to it by the Plaintiff or any other member of the club.

The circumstances under which the Plaintiff was expelled were shortly as follows:—The Plaintiff caused to be printed and circulated a pamphlet entitled "A Farce and a Villainy—Heads I Win, Tails you Lose," in which the conduct of Lieutenant-General *Stephenson*, who was also a member of the club, was severely reflected on. A copy of this pamphlet was inclosed in a wrapper on the outside of which was printed "Dishonourable Conduct of Colonel (now Lieutenant-General) *Stephenson*," and was sent by the Plaintiff by the post to Lieutenant-General *Stephenson*, at his official address, the Guards' Orderly Room at the Horse Guards.

This having been brought to the notice of the committee of the club, they directed a letter to be written to the Plaintiff by the secretary, asking him whether an envelope with the printed heading "Dishonourable Conduct of Colonel (now Lieutenant-General) *Stephenson*," containing a printed paper headed "A Farce and a Villainy—Heads I Win, Tails you Lose," was sent by him or by his direction or authority.

On the 21st of January, 1879, the Plaintiff replied as follows:—"I beg to acknowledge the receipt of your letter, dated the 17th

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of January, written by the direction of the committee of the *Travellers' Club.* I request you to inform the committee that I decline to give any reply whatever to the question contained therein."

On the 24th of January the secretary wrote to the Plaintiff a letter, in which, after referring to the previous correspondence, he said, "The committee, therefore, in the absence of any disavowal on your part, hold you responsible for having sent the cover and its contents. In these circumstances it becomes the duty of the committee to consider the case as it now stands before them, and after doing so with their best care and attention, they are of opinion that in sending to a member of the club a cover with the offensive superscription set out in my former letter, and containing a printed paper or pamphlet in which disgraceful charges are made against the honour and character of certain members of the club, your conduct has been injurious to the character and interests of the club, and that the case is one which may be dealt with under the 26th rule of the club. But the committee, before taking further steps in the matter, would be glad to hear whether you have any explanation to offer on the subject. The committee wish you distinctly to understand that the matter before them only refers to the cover directed to Lieutenant-General *Stephenson*, and its inclosure, they having nothing to do with any previous disagreement between yourself and the military authorities."

On the 1st of February, 1879, the Plaintiff wrote to the secretary as follows:—

"Respecting your letter of January 24th, I request you to inform the committee that I am not responsible to them in any such matters as those of which they make mention, and that if Lieutenant-General *Stephenson* or any other member of the *Travellers' Club* considers himself wronged by anybody, laws of honour direct that he should himself take notice of it, and also that those who submit to charges which in the name of the committee you describe as being against their honour and character and as involving disgrace to them, are those who are required to give an account of their conduct. And I request you to further inform the committee that under any circumstances rule 26 was never intended to settle personal disputes, nor to enable members of the

Travellers' Club to transfer the guardianship of their honour to the committee."

On the 14th of February the secretary wrote to the Plaintiff a letter, in which he said, "I am desired to inform you that as you have failed to give any satisfactory explanation of your conduct in answer to the request of the committee, the committee deem it their duty, in accordance with the provisions of rule No. 26, to recommend you to resign your membership of the *Travellers' Club*."

The Plaintiff not having resigned, notice was given that at a general meeting to be held on the 31st of March, 1879, it would be proposed, on behalf of the committee, to expel the Plaintiff from the club. The notice was placed in the morning-room of the club, and a copy was sent to the Plaintiff. At the meeting the resolution for expelling the Plaintiff was carried by the requisite majority, the votes being taken by ballot, and the number being 108 in favour of the resolution, and 36 against it.

The resolution as entered in the minute book of the club was as follows:—

"The recommendation of the committee that Lieutenant-Colonel *Dawkins* should resign his membership not having been complied with, it was moved on behalf of the committee that Colonel *Dawkins* be expelled the club."

The minute then proceeded as follows:—

"A short discussion took place, and the resolution was opposed by two or three of the speakers. A ballot was then had, and 108 appeared for the resolution and 36 against it. The resolution was therefore declared to be carried by the requisite majority in accordance with rule 26."

On the 2nd of April, 1879, a cheque for the Plaintiff's subscription for the year 1879 was sent to the Plaintiff's bankers, but it was returned by the bankers under his instructions.

The Plaintiff alleged in his statement of claim that the resolution had been come to in an unfair, capricious, and arbitrary manner, and not *bonâ fide*: that notice convening the meeting at which it was carried had not been properly given: that the

26th rule had not been properly added to the rules of the club, and was not binding on the members: and he submitted that he had not been guilty of any conduct injurious to the character and interests of the club. These charges were denied by the Defendants.

As evidence of unfairness the Plaintiff relied on the fact that of the seventeen members of the committee one was serving, and six had served, in the Brigade of Guards then under General *Stephenson's* command, and four others were serving or had served in the army; and the Plaintiff alleged that the said eleven members were liable to be influenced by General *Stephenson* to be hostile to the Plaintiff.

The action came on for trial before the Master of the Rolls on the 23rd of June, 1879.

Chitty, Q.C., and *Oswald*, for the Plaintiff.

Sir *H. James*, Q.C., *Davey*, Q.C., and *Crossley*, for the Defendants.

The following cases were cited: *Hopkinson* v. *Marquis of Exeter* (1); *Fisher* v. *Keane* (2).

JESSEL, M.R.:—

This case is one of considerable difficulty. There are two principal points raised: First, whether the rule in question under which the expulsion of Colonel *Dawkins* has taken place is or is not a rule binding on him as a member of the *Travellers' Club.* Now that does not depend on the inherent power of a club to pass a rule to expel one or more of its members; I for one am unaware of the existence of such a power, and I was surprised to hear such a proposition put forward. There is no more inherent power in the members of a club to alter their rules so as to expel one of its members against the wishes of the minority, than there is in the members of any society or partnership which is founded on a contract, that written contract of course expressing the terms on which the members associate together; and it is intolerable to imagine that the majority should in such a case claim an inherent power of expelling the minority. I say that because that has been a matter pressed upon me as if capable of argument. I think it is not. The next question is, I conceive, one of construction of the original rules of the club, and I think it is my duty to construe the rules fairly and in the same way as I should any other contract, and I have no right to give the words other than their ordinary meaning, or to construe the rules otherwise than in their ordinary sense. [His Lordship then read the 13th, 25th, and 27th rules, and continued :—] In my opinion the fair meaning of those rules is that a general meeting may alter rules affecting the general interests of the club of which due notice has been given, when there is a majority of that meeting in favour of the alteration, not less than forty members being present. Now what is the meaning of the words "affecting the general interests of the club"? Why should I cut down the meaning of those words? Why should I say that a proposition for expelling a member whose conduct has interfered unduly with the general interests of the club is not a proposition affecting the general interests of the club? It seems to me that, if fairly looked at, a rule with reference to expelling a member who has injured the club is a rule which may be said to come within these words. It seems to me that that is the true reading of the rule, and consequently that a rule for that purpose was not *ultrà vires*, and I so hold. Now it is said that what has occurred since would prevent that rule prevailing. The rule in question was first passed at a general meeting in May, 1875, at which the Plaintiff was present, and it was agreed to unanimously, although the Plaintiff says that he assented to it understanding that it was intended only to apply to cases of dishonourable conduct. Not only was it agreed to unanimously in his presence, but no exception was taken by anybody to the rule until the year 1877, when some one suggested that it was doubtful whether forty members were present or not. It is only put as doubtful. Thereupon the club again brought forward the rule on the 16th of July, 1877, and it was passed at a general meeting of the club. Then the rules having to be revised by a reference to the committee, there was an instruction given to the committee to revise, and on the 24th of June, 1878, they were submitted to a general meeting. All this time Colonel *Dawkins* and the other old members not only remained members, but they remained members without remonstrance and without protest. They not only took the benefits of the club, but they took the benefits of the club against other members, because they might have been called upon to expel other members. I hold that what occurred amounted to an assent by the members to the new rule, and it is impossible for them, or any of them, now to allege that the new rule cannot bind all the members of the club. That, therefore, disposes of one point.

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(1) Law Rep. 5 Eq. 63.

(2) 11 Ch. D. 353.

Now, I come to the other point, which, as I have already said, is one of great difficulty. Taking it by itself I should not entertain much doubt about it, but the 26th rule is in these terms. [His Lordship read this rule, and continued:—] It is to be observed that this does not rest on the opinion of the committee, because it says that any twenty members of the club may certify that in their opinion the conduct of a member is injurious to the interests of the club. Is it meant that any twenty members of the club may certify with respect to the conduct of any individual member of the club, as was suggested by Sir *Henry James?* Is it to be supposed that the members of the *Travellers' Club* intended that if twenty members sent in a letter stating that one of the members of the club had been seen in the park day after day driving with a woman of bad character, that they could ask the committee to take that into their consideration and expel him from the club? Or if a member of the club was seen in the betting ring, or was constantly seen doing that which is contrary to good morals, making bets in public, and was notoriously associated with people who so behaved, is it to be supposed that they thereupon could request the committee to call a general meeting to consider his conduct and expel him? To my mind such a proposition is simply extravagant. I cannot imagine that either the members of the club who passed this resolution or the committee who acted upon the rule anticipated any such consequences. Then it comes back to this: Where, in the opinion of the committee or any twenty members, the conduct of a member is such as I have mentioned, it must mean in a reasonable way. The law says, and rightly says, that in all these things people must act *bonâ fide. Bonâ fide* means that they shall act with some cause, or, as the law phrases it, with reasonable and probable cause. Consequently the question I have to decide is whether that point is raised on the pleadings; and next, if it is not, and I have power to amend, whether it ought to prevail. Now, I have looked over the pleadings with care, and in my opinion this point is not properly raised. But that would not be fatal, because I might amend the pleadings. I find in the pleadings a suggestion of malice as against the resolution of the general meeting in the most express terms, but I can find no statement or allegation accusing the committee of malice, that is to say, of coming to a conclusion or opinion maliciously and without reasonable or probable cause. There is an allegation that the majority of the committee conspired for different purposes to obtain a majority at the meeting, but there is no such allegation as that which I have referred to. Still I might possibly amend if I were satisfied that I might come to the conclusion that they so acted. Now, it is not for me to say whether I should have come to the same conclusion as they did. I should feel it extremely difficult to believe, unless there were proof to the contrary, that a body of reasonable and sensible men would come to the conclusion that a letter addressed by one member, not in his character as member, to another member, not in his character as member of the club, whether there was anything outside the letter or not, would be injurious to the character and interests of the club. That is all that is stated, and in fact less is stated in the affidavit, for the members are made to swear that the writing on the outside of the letter, which would have been read by the postman and the recipient as far as they knew, and no one else, unless the recipient chose to shew it to others, would be conduct injurious to the character and interests of the *Travellers' Club*. I say I cannot myself imagine, without direct evidence, that such an act as that standing alone would be sufficient to warrant such an opinion being expressed as that which has been expressed here. But at the same time I must not forget that committees of this kind do not act, and are not expected to act, on strictly legal evidence, nor should I wish them to be confined to anything of the sort. A committee in arriving at a conclusion may be—I will not say "biassed," because that is a hard term—but may be drawn to a conclusion by one of a great

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many circumstances which are perfectly notorious and well known in the club, and perfectly true in fact and in every detail, though not at the moment proved before them. They may have considered the immediate conduct a culminating act, although they may not have so expressed it. Now, if there had been a charge of that kind in the claim it might, and probably would, have been met by an answer of the kind I have mentioned. Then I have to consider whether, looking not only at the names and social position of the gentlemen in question, but to their position in the club, and the discretionary power vested in them, I can set up my own opinion as to whether or not such an act could be considered injurious to the extent of saying that their conduct in certifying the contrary was malicious—that it was so totally devoid of reasonable and probable cause as that I could brand them with the epithet of being either idiots or corrupt. I shall not pretend to go that length, although I cannot, as far as I am concerned, imagine how this single act could be injurious to the character and interests of the club. I am not, as I said before, able to say that I ought to impute to these gentlemen legal malice. I do not think it impossible that reasonable men could come to the conclusion, on some grounds not known to me, that the mere writing on that letter, and the direction of it to General *Stephenson*, was in itself an act which was injurious to the character and interests of the club. That being so, I am compelled by the exigencies of the case to act entirely on the opinion of the committee. I do not feel that it would be right to say that the committee were so unreasonable as to act entirely without reasonable and probable cause, or so corruptly biassed and unfair as to knowingly state that to be their opinion which was not their opinion, fairly arrived at so far as their light and information enabled them to arrive at an opinion adverse to Colonel *Dawkins*. I must not forget also that whatever is to be attributed to the committee, we have the opinion of the general meeting to the same effect, and although it is quite possible that the attention of the members of the general meeting was not called to the exact words of the rule, and the question was not discussed before them, one cannot help knowing that there must have been in their opinion something very grave as affecting Colonel *Dawkins* as a member of the club to induce so large a majority to vote for the Plaintiff's expulsion. He may have been, and probably was, a very unpopular member, otherwise he would not have been expelled at all, but besides that, one might expect at the hands of Englishmen, and especially English gentlemen, who are always lovers of fair play, that which would certainly entitle him to, and secure for him, the support of all those who were impartial if they had thought it really was a case in which he was the aggrieved party and not the aggressor. Looking at the matter as a whole, I think the safer course for a Judge sitting alone is to say that the allegation of malice is not sufficiently made out, and therefore that the action should be dismissed.

C. A.

From this decision the Plaintiff appealed. The appeal was heard on the 1st of February, 1881.

Oswald, and *S. L. Phipson*, for the Appellant :—

In the first place, the rule under which the general meeting expelled the Plaintiff was *ultrà vires* and void; at all events it could not affect the Plaintiff. It did not exist when the Plaintiff joined the club, and the members had no power to alter the constitution of the club by passing this rule. They professed to pass it under the 13th rule, but that rule does not apply to any alteration in the fundamental rules of the club, but only in rules for its management. If it was valid at all, it could only bind the members subsequently admitted, and could not have a retrospective operation on those who belonged to the club before it was passed, and who joined it under different conditions.

In the second place, the proceedings under which the rule was put in operation against the Plaintiff were irregular. He was not summoned before the committee, and had no opportunity of being heard in his own defence. This in itself is sufficient to invalidate the proceedings: *Labouchere* v. *Earl of Wharncliffe* (1); *Fisher* v. *Keane* (2). If the committee had heard his explanation as to the whole affair, and not confined themselves to the particular act charged, they might have come to a different conclusion. Moreover, there was no formal resolution that the Plaintiff's conduct was injurious to the interests and character of the club. The meeting was simply called upon to support the committee and expel him. When we look at the substance of the charge, the offence imputed to the Plaintiff does not come within the words of the rule as being "injurious to the character and interests of the club." It was never intended that it should apply to a private quarrel between members, or to acts not done within the club. The Master of the Rolls is in our favour on this point. In *Hopkinson* v. *Marquis of Exeter* (1), the club was a political club, and that case has no application to the present.

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(1) 13 Ch. D. 346.

(2) 11 Ch. D. 353.

The constitution of the committee was such that they were, perhaps unconsciously, biassed against the Plaintiff. In a case of this kind the member expelled has a right to claim that all that is done should be above suspicion.

Sir *H. James*, A.G., *Davey*, Q.C., and *Crossley*, Q.C., for the Defendants, were not called on.

JAMES, L.J.:—

The case has been argued at great length and with great pertinacity by one of the learned counsel for the Appellant, and with reasonable brevity and great lucidity by the other counsel for the Appellant, and we do not think it necessary to have any further assistance from counsel on behalf of the Respondent.

Now I think it may not be undesirable in dealing with this case, as general principles are involved in it, to refer to a decision of the Lords Commissioners in the year 1850, in the case of *Inderwick* v. *Snell* (2). They were not dealing with a club, but they were dealing with a joint-stock company. The considerations which influenced them seem to me equally useful for the purpose of determining how Courts of Law should deal with institutions like this. In that case—I am reading from page 221 of the report —they say, "Now the 27th clause of the deed provides 'that an extraordinary general meeting, specially called for the purpose, may remove from his office any director or auditor for negligence, misconduct in office, or any other reasonable cause.' The argument for the Plaintiffs rested on the allegation that the general cause of removal referred to in the clause being expressed to be

(1) Law Rep. 5 Eq. 63.

(2) 2 Mac. & G. 216.

reasonable, prevents the power referred to from being a power to remove at pleasure arbitrarily or capriciously, and made it requisite that the proceeding for exercising the power should be in its nature judicial, and that the reasonable cause should be such as a Court of Justice would consider good and sufficient. If this argument could be sustained, all proceedings at such meetings would be subject to the review of the Courts of Justice, which would have to enquire whether the cause of removal which was charged was in their view reasonable, whether the charges were *bonâ fide* brought forward, whether they were substantiated by such evidence as the nature of the case required, and whether the conclusion was come to upon a due consideration of the charge and evidence. But the deed is silent as to these matters, and the question is whether any such power of control in the Courts of Justice is to be inferred from the words 'reasonable cause' contained in the 27th clause, whether the expression 'reasonable cause' contained in such a deed of a trading partnership can be held to be such a cause as, upon investigation in a Court of Justice, must be held to be *bonâ fide*, founded on sufficient evidence, and just, or whether it ought not to be held to mean such cause as in the opinion of the shareholders duly assembled shall be deemed reasonable. We think the latter is the true construction and effect of the deed. In a moral point of view no doubt every charge of a cause of removal ought to be made *bonâ fide*, substantiated by sufficient evidence, and determined on a due consideration of the charge and evidence, and those who act on other principles may be guilty of a moral offence, they may be very unjust, and those who (being present at the meeting) are innocently misled by the statements made to them have no doubt a just right to complain that they have been led to concur in an unjust act. But the question is whether by this deed the shareholders duly assembled at a general meeting might not or had not a right to remove a director for a cause which they thought reasonable, without its being incumbent upon them to prove to this or any other Court of Justice that the charge was true, and the decision just, or that the case was substantiated after a due consideration of the evidence and charge. We cannot take upon ourselves to say that in the case of a trading partnership like this,

this Court has, upon such a clause in the deed of partnership, jurisdiction or authority to determine whether, by the unfounded speech of any supporter of the charge, the shareholders present may not have been misled or unduly influenced. All such meetings are liable to be misled by false or erroneous statements, and the amount of error or injustice thereby occasioned can rarely, if ever, be appreciated. This Court might enquire whether the meeting was regularly held, and in cases of fraud clearly proved might perhaps interfere with the acts done; but supposing the meeting to be regularly convened and held, the shareholders assembled at such meeting may exercise the powers given them by the deed. The effect of speeches and representations cannot be estimated, and for those who think themselves aggrieved by such representations, or think the conclusion unreasonable, it would seem that the only remedy is present defence by stating the truth, and demanding time for investigation and proof, or the calling of another meeting at which the whole matter may be reconsidered. The Plaintiffs, objecting to this meeting and considering it illegal, protested against it, but abstained from attending, and therefore made no answer or defence to and required no proof of the charges made against them. The adoption of this course was unfortunate, but does not afford any grounds for the interference of this Court." Then they go on to say they believe the charges were unfounded, but they would not interfere.

Now, reading "club" for "trading partnership," I apprehend every word of that judgment is applicable to the present case. We have no right to sit as a Court of Appeal upon the decision of the members of a club duly assembled. All we have to consider is whether the notice was or was not given according to the proper rules, whether the meeting was properly convened, and whether the meeting, if properly convened, had come to the conclusion that this gentleman ought to be expelled, having before it the fact that the committee had, upon investigation of the matter, come to the conclusion, and expressed the opinion, that his conduct was such as to entitle them to call upon him to resign. Of course, the object of calling the meeting was to sit in review upon the opinion of the committee, and the gentleman, if he does not choose to resign, has a right, by the rules, to have the matter brought before

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the general meeting. The matter was brought before the general meeting, the committee having come to the conclusion, upon the matters before them, that this conduct was such as was likely to be injurious to the character and interests of the club.

Now what they said was, "We think that sending an envelope with a very offensive superscription by one member of the club to another member of the club is a kind of misconduct likely to be injurious." Unless we can say that their decision that such conduct would be injurious to the character and interests of the club was so manifestly absurd and so manifestly idle that it could only have been a false pretence to cover something else, and therefore was, in fact, fraudulently put forward for the purpose of giving effect to some preconceived notion of removing him without just cause—for which I can see no ground or foundation whatever—we have no right to sit in judgment on their decision. I am far from thinking that the opinion of the committee respecting the envelope was wrong. Perhaps I am going further than I ought, because that matter is not before us; but with all deference to the Master of the Rolls, I am not satisfied with what he said on the subject. On the contrary, I am satisfied that I should have come to the same conclusion as the general meeting. I can conceive nothing more injurious to the character and interests of a club than one member of a club sending through the post an open envelope with those charges upon it. I do not say anything about the pamphlet, but the thing, to my mind, that reasonably led them, upon such an insulting act, to the conclusion at which they arrived, was the sending the envelope by one member of the club to another, and it is not for me to say the committee were not well warranted in coming to the conclusion they did.

Now, did they give him notice? It appears to me they gave him ample notice. He does not deny he sent that letter. They gave him every opportunity of saying anything he chose to say to the committee or to the meeting, and he could have said, Notwithstanding I did that, do you think it is a case for expulsion? According to my view he had the most ample opportunity of taking the opinion of the general assembly of the members duly convened, who were the real judges, supposing they did not act corruptly or fraudulently, of whether or not that rule ought to be applied.

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I am therefore of opinion that the decision of the Master of the Rolls ought to be affirmed.

Brett, L.J.:—

I think we ought to take great care that this Court does not by successive decisions usurp an authority in these cases for which there is no colour in point of law. In my opinion there is some danger that the Courts will undertake to act as Courts of Appeal against the decisions of members of clubs, whereas the Court has no right or authority whatever to sit in appeal upon them at all. The only question which a Court can properly consider is whether the members of the club, under such circumstances, have acted *ultrà vires* or not, and it seems to me the only questions which a Court can properly entertain for that purpose are, whether anything has been done which is contrary to natural justice, although it is within the rules of a club—in other words, whether the rules of the club are contrary to natural justice; secondly, whether a person who has not condoned the departure from them has been acted against contrary to the rules of the club; and thirdly, whether the decision of the club has been come to *bonâ fide* or not. Unless one of those charges can be made out by those who come before the Court, the Court has no power to interfere with what has been done. It seems to me the only question in the present case is upon the last matter, viz., whether what has been done is *bonâ fide.*

The Court has no right, in my opinion, to consider whether what was done was right or not, or, even as a substantive question, whether what was decided was reasonable or not. The only question is, whether it was done *bonâ fide.* Now, it is true that an element, in considering whether a matter has been done in good faith, is the question whether what has been done is really beyond all reason. If that were so it would be evidence of want of good faith; but even where that exists, it is not a necessary conclusion that there has been want of good faith, for, even after having come to the conclusion that a decision was wholly unreasonable, one might be convinced *aliunde* that nevertheless there was no malice—that what was done was done in good faith. Therefore the mere proof that it was contrary to reason is no sufficient ground for the interference of the Court. It is like the case of a malicious prosecution, where if there is a want of reasonable and probable cause, that is evidence to go to the jury to support the other necessary allegation that there was malice in fact, but then the jury are told, "even though there was a want of reasonable and probable cause, you must consider and decide for yourselves whether, besides that, there was malice in fact." Unless they find there was also malice in fact in such cases the propositions necessary for them to affirm are not made out. So, in this case, I wish to repeat, even though one were of opinion that the decision was wholly beyond reason, yet in such a case as this, considering the circumstances which are in evidence, and the persons against whom the charge is made, and the absolute absence of any evidence of indirect motive—even if I thought the decisions were absolutely unreasonable—I should have declined to find the decision was contrary to good faith, and should therefore have been of opinion, even though the decision were unreasonable, that there was no ground for the interference of the Court.

The first question then is whether there was anything contrary to natural justice. If a decision was come to depriving a gentleman of his position on such a charge as must be made out here, namely, that he has been guilty of conduct injurious to the character and interests of the club, in my opinion there would be a denial of natural justice if a decision was come to without his having an opportunity of being heard.

Now, in my opinion, the charge made against the Plaintiff from beginning to end was the sending the envelope through the public post to an officer in command of a regiment, on the outside of which envelope was "Dishonourable Conduct of General *Stephenson*." That was the charge. It is true that the fact of the pamphlet being inside was mentioned, but in this case that was not the material charge; that might have been a charge in other cases, and a very fair charge, in my opinion; but in this case the substance of the charge from beginning to end was the sending the envelope. In the first letter he is informed, "We are told you have sent an envelope; we want you to answer whether that is true or not"? The gentleman will not answer, but says, "I request you to inform the committee that I decline to give any reply." They do not take that as conclusive, but they enter upon the inquiry. They have a letter in his own handwriting before them; they do that which was lawful and legitimate—they compare that with the writing on the envelope to General *Stephenson*, and they say, "We come to the conclusion it is your handwriting." They do more. They then send a letter to Colonel *Dawkins* to say we have come to a conclusion, *primâ facie* no doubt, but they say having done this we ask you "Will you give any explanation"? Then he says, "I deny your jurisdiction to ask me." That is telling them he will not be a party to their inquiry. It is refusing to give any explanation. It is a direct refusal to go before them, and after that it seems to me he had ample opportunity of explaining that which was in terms told to him to be a charge against him. Therefore in this case there was no want of natural justice. In my opinion he had ample opportunity before the general meeting of giving an explanation, if he chose, as to the sending that envelope, but he declined to give any explanation whatever.

Then it was urged that this matter was not carried out according to the rules, and the first ground taken was that the rule under which it was done was a void rule, because the rule had not been properly passed. I agree with the Master of the Rolls entirely in his reasoning, that the rule was properly passed. But then it was said that this was not done according to the rule, because it was said the rule had been acted upon in a sense of being applied to matters which had occurred before it was passed. The answer is, it was not so applied. It is quite true the rule ought not to be applied to matters which had happened before the rule was passed; but it was not so, it was only applied to a matter which had happened after it was passed, therefore that objection fails.

Then it was said there was malice in fact, and that the Master of the Rolls is wrong in holding there was no malice in fact. That was put upon two grounds. It was suggested—it seems to me wantonly, improperly, and indefensibly—by insinuation, and not by direct assertion, that the gentlemen whose names are here put forward as the Defendants in this case, had allowed themselves to be actuated by subservience to higher authority, and that they had come to a conclusion which they did not believe to be true, because they were dealing with matters affecting authorities at the Horse Guards. It is said that counsel do not suggest such things unless so instructed. All I can say is, there is not the slightest evidence to support such a suggestion. If such a suggestion had been made before me, where it would have been my duty to consider whether such a question should have been left to a jury, I should have said there is not a semblance of such evidence, and, therefore, those who have instructed counsel to make such a suggestion have done that which is contrary to every known sense of propriety.

Then it was said there is a want of reason in the decision, and that upon that the Master of the Rolls ought to have determined there was malice in fact. It seems to me that raises this proposition—Can the Court say that no reasonable men could have come to the decision that to send such an envelope to an officer in command of his regiment to his orderly room in the barracks where he has command—I care not whether he was a member of the club or not—could not reasonable men come reasonably to the conclusion that to do such a thing as that was scandalous, ungentlemanly, and inconsistent with the character and proper conduct of an officer and a gentleman? In my opinion reasonable men could come to such a conclusion. And if they have come to the conclusion that the conduct of a member of a club has been scandalous, ungentlemanly, and contrary to the proper conduct of an officer and a gentleman, it seems to me he cannot complain of their going further, and saying such conduct is injurious to the character and interests of the club.

Therefore I see no grounds for saying this is not a reasonable decision; but I wish to say further, if I thought it an unreasonable decision I should have declined to come to the conclusion that there was any malice or want of good faith in those who decided it.

COTTON, L.J.:—

We have to consider, first, whether the action of the committee and of the general meeting was authorized by any rule, that is to say, whether it was within the terms of the rule and whether it was regular; and, secondly, if those questions are answered ad-

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versely to the Appellant, whether it has been made out to the Court that the proceedings were not in the *bonâ fide* honest exercise of the powers given by the rule, but malicious and fraudulent.

We are not here to sit as a Court of Appeal from the decision of the committee or of the general meeting. We are not here to say whether we should have arrived at such a conclusion or not, and the question whether the decision was erroneous or not can only be taken into consideration in determining whether that decision is so absurd or evidently wrong as to afford evidence that the action was not *bonâ fide*, but was malicious or capricious, or proceeding from something other than a fair and honest exercise of the powers given by the rule.

First, I will consider shortly whether this rule is a valid and binding rule.

The 13th of the original rules recognises the power to make any alteration in the standing rules of the club, and it has been urged that that does not justify such a rule as this, under which the action of the committee and the general meeting has been taken in expelling a member; but then we must consider together with the 13th rule the 27th, that no proposition affecting the general interest of the club shall be brought forward at a general meeting unless there are certain things done. That shews, upon the construction of these rules, that rules affecting the general interests of the club might be passed, even although there was no similar rule existing in the original rules. In my opinion, therefore, having regard to rule 27 and rule 13, the club had power to pass the rule, on which the committee and general meeting acted.

The next thing was this: It was said that what was done under this rule 26 was irregular, and that it was not in accordance with natural justice. The first objection taken was this, that the new rule was not retrospective. I never like terms that want explanation for the purpose of seeing what they mean. The real meaning of that objection was this, that rule 26 did not apply to those who were old members of the club; that, in other words, was raising the first objection over again. For, as to new members, if they chose to submit to a rule already passed that they should be liable to expulsion if they did certain things, I do not see how any question could be raised by them as to the validity of that rule, to which they had voluntarily submitted themselves. When you are considering whether the rule can be made binding on the club, you mean so as to bind not only those who come in subsequently and submit to it, but those already in the club. When by the voice of the majority of a meeting acting within its powers a rule is made, it must apply not only to future members but to all members of the club. In my opinion that objection fails.

Then we come to the other objection, as to the alleged irregularity or unfairness in carrying on these proceedings under this rule. First, it is said that the Plaintiff was not summoned to appear before the committee. It is unnecessary for me to refer again to the letters. He was told that the committee desired to know what explanation he had to give. He entirely objected to the right of the committee to go into the charge. He said, "I will not appear before you to justify what I have done." It is true the committee did say, and in my opinion rightly, "We do not go into the truth of the charges you make against General *Stephenson;* but, irrespective of the truth of those charges, come before us and justify, if you can, that with which you are particularly charged, namely, the sending to him to his orderly room a pamphlet with this envelope." This decided, and in my opinion rightly, that the question was, not the truth of the charges made in the pamphlet, but whether the sending a pamphlet or envelope with this superscription to a fellow-member of the club, to an officer in command of a regiment or brigade at his orderly room, was or was not a matter affecting injuriously the character and interests of the club. In my opinion that objection cannot prevail.

Then it was said there was no finding by the general meeting that the conduct of the Plaintiff, which the committee, within the rule, found to be injurious, was, in fact, injurious to the character and interests of the club. In form there was not, but we are dealing with matter of substance, and the substance of the finding of the general meeting was, "We are of opinion that if Colonel *Dawkins* does not retire he ought to be expelled." That involved two things, first, that his conduct in this matter was injurious to the character and interests of the club, and secondly, that the circumstances required that he should be expelled. Of course they could not expel him without finding his conduct was injurious to the character and interests of the club, but they might say, "Though your conduct has been injurious to the character and interests of the club, we think it unnecessary to impose upon you the extreme penalty of expelling you from the club." When the matter came before the general meeting it was an appeal to the general meeting from the resolution arrived at by the committee, which they, the committee, had no power to enforce, and the general meeting would not help them to enforce it, unless they were satisfied that the only ground upon which the committee had power to proceed was established to the satisfaction of the general meeting. It was urged that the resolution was informal, that it was not put in a proper way. If it were a fair and honest exercise of the power conferred by the rule, I think that we have no right to interfere with the exercise of the power simply because something was not put in the formal way that might have been required upon demurrer. It was suggested that the question was, "Will you vote for the committee?" But here it was put, "Do you support as right the opinion of the committee or not?" In my opinion this objection fails.

The substantial question remains, namely, has it been made out that what was done was not in the fair exercise of the power given by the rule, and that it was done, not *bonâ fide* or honestly, but maliciously, or that there was a denial of natural justice? The only suggested denial of natural justice was what I have dealt with, not summoning the Plaintiff or giving him an opportunity of being heard. As regards the want of *bona fides* there is no evidence whatever. During the argument I pointed out that, with the exception of certain matters which I shall refer to presently, the only evidence in support of the grave allegation made against the committee and the members attending the general meeting, was the affidavit of the Plaintiff that he believed certain motives had actuated one and the other. I repeat that is not evidence at all; if there are no facts to raise a *primâ facie* case against them, they could not have been held guilty of what is charged by the Plaintiff, simply because they did not come forward to meet his affidavit by denial.

I have heard only two facts which were said to raise the *primâ* *facie* case of *mala fides*—one was that there was a presumption that all the members of the club would support their committee, and the other, which is a charge made in terms by the statement of claim (and which ought not, I think, to have been there), that from the position of some of the members of the committee it was to be presumed they acted unfairly and dishonestly; for that is what it comes to.

I cannot accede to the suggestion in a matter like this, that members of a club, or any body of gentlemen, will support their committee at the expense of truth and honesty. When they have a matter like this before them, I am satisfied, from my own experience of gentlemen, that they will consider the matter fairly, and not adhere without regard to justice to the conclusion at which the committee may have previously arrived.

Then there is the other matter. It is, I must say, a charge of a gross character to suggest that any officers in the army would come to the conclusion at which they did, because they held official relations with the persons with whom the Plaintiff was at variance,—that is a charge, I say, utterly unwarrantable, and, in my opinion, the fact of the official connection raises no such presumption as that which the Plaintiff seeks to draw from it.

There is, therefore, no evidence to prove that this conclusion of the committee and of the general meeting was arrived at unfairly or dishonestly; and the two facts which were relied upon in argument, in my opinion, do not raise a *primâ facie* case against either the committee or the general meeting. We have not to consider whether they rightly or wrongly arrived at their conclusion. I do not consider that, but in my opinion there is no ground at all for asking the Court to interfere with the decision arrived at by those bodies.

Solicitors: *Guscotte, Wadham, & Daw; Nicholl, Manisty, & Co.*

M. W.

C. A.

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M. R.
Feb. 4.

C. A.
March 29.

HENDRIKS *v.* MONTAGU.

[1880 H. 351.]

Companies Act, 1862, *s.* 20—*Unregistered Company—Intended Registration of New Company—Similarity of Name—Injunction quia timet.*

A company not registered under the *Companies Act*, 1862, can restrain the registration under that Act of a projected new company, which is intended to carry on the same business as the unregistered company and to bear a name so similar to that of the unregistered company as to be calculated to deceive the public.

THIS was an action by Mr. *Hendriks*, the actuary of, and the proper officer under an Act of Parliament to sue on behalf of, the *Universal Life Assurance Society*, against Lord *Robert Montagu*, Mr. *Alexander*, and others, the promoters of a projected new company intended to be incorporated under the *Companies Act*, 1862, and to be called the *Universe Life Assurance Association.*

The writ claimed an injunction to restrain the Defendants from applying to the Registrar of Joint Stock Companies in *England* for registration under the Companies Acts of any company to be incorporated under the name of the *Universe Life Assurance Association*, or any other name likely to mislead or deceive the public into the belief that the company, being incorporated as aforesaid, is the same as the *Universal Life Assurance Society;* from issuing or publishing advertisements, circulars, or prospectuses representing that a company is to be incorporated pursuant to the *Companies Act*, 1862, under the name of the *Universe Life Assurance Association, Limited*, or any such other name as aforesaid; and from carrying on or commencing any business under the name of the *Universe Life Assurance Association, Limited*, or any such other name as aforesaid.

The *Universal Life Assurance Society* was formed in 1834, and had acquired a large business in life assurance at home and abroad, and had three branch offices—one in *London* and two in *India*.

In January, 1881, the Defendants issued and published extensively prospectuses and advertisements headed in large type with the words "*Universe Life Assurance Association, Limited,*" and stating "this association is formed to transact and carry on the business of life assurance in all its various forms at home, in the colonies, and abroad;" and that its temporary offices were at *Mansion House Buildings*—about 300 yards from the offices of the *Universal Life Assurance Society*, which were in *Size Lane.*

The attention of the Defendants was at once drawn by the officers of the *Universal Life* Office to the similarity between the two names, but they declined to alter the name of the intended company, and thereupon the writ in this action was issued.

The Plaintiffs now moved for an interim injunction in the terms of the indorsement on the writ.

The affidavits by Mr. *Hendriks* and other actuaries, in support of the motion, were to the effect that in their opinion if a company under the name of the *Universe Life Assurance Association, Limited,* were allowed to be incorporated and to carry on business under that name, the business at the *Universal Life Assurance Society* would be seriously interfered with and damaged by reason of the public failing to distinguish between the two societies on account of the similarity of name.

The Defendants' affidavits denied that in selecting the name of the *Universe Life Assurance Association, Limited,* there had existed any intention of deceiving or misleading the public by adopting a title similar to that of the Plaintiff company. The word "*Universe*" had been selected as the title of the proposed company without any reference to or thought of the Plaintiff company.

Chitty, Q.C., and *H. W. Horne,* for the Plaintiffs.

Roxburgh, Q.C., and *Bond Coxe,* for the Defendants.

JESSEL, M.R.:—

This is a motion founded on the 20th section of the *Companies Act,* 1862, and that section only applies to taking the name of a subsisting company already registered. Why it should have been confined to that, I am quite unable to say, but it is confined to that, and the objection is taken that the present company, the Plaintiff, is not a registered company, and that, therefore, the section does not apply at all. That objection once made appears to me to be entirely fatal to this application. Then, Mr. *Chitty*, if he will allow me to say so, I think had better not have wasted the time of the Court by attempting to bolster up a case founded on a mere mistake, by setting up a totally different equity than that which is either alleged or proved.

The writ which I have got before me is this:—"For an injunction to restrain the Defendants from applying to the Registrar of Joint Stock Companies in *England* for registration under the *Companies Act* of a company to be incorporated under the name of the *Universe Life Assurance Association*, or any other name likely to mislead or deceive the public into the belief that the company, being incorporated as aforesaid, is the same as the *Universal Life Assurance Society*." It is exactly under the Act of Parliament. Of course there is no such equity. You may register in any name, whether the name is likely to deceive or not, because you may carry on business in such a way that you will not deceive. There is nothing to prevent a company registering in the same name. They may carry on a totally different business. Supposing the company's name was the *Universal* alone—the *Universal Company*—if it were not for the Act of Parliament you might have a similar *Universal Company*; but the first company might be a life insurance company and the second a fire insurance company. You could not restrain it. The mere identity of name will not do. Suppose the first company was dealing in manure and the second in hardware, you could not restrain it. I am thinking of the same identical name. That is not a ground for an injunction. As I have already explained, the ground for an injunction is the fraudulent attempt to appropriate other persons' or other companies' business.

Well, then, the next part of the writ is this: "From issuing or publishing any advertisements, circulars, or prospectuses representing that a company is to be incorporated pursuant to the *Companies Act* under the name of the *Universe Life Assurance Association, Limited*, or any such other name as aforesaid."—What equity there is for that I am utterly at a loss to understand, either in the Act or anywhere else, to prevent the registration. Why a man shall not advertise that a company is going to be incorporated under that name I cannot understand.—" And from carrying on or commencing any business under the name of the *Universe Life Assurance Association, Limited,* or any such other name as aforesaid." It is to restrain them from carrying on business under a particular name. That you cannot do. You can restrain them from doing it either where it is done with the intent to appropriate the Plaintiff's business or where it, in fact, does appropriate unfairly the Plaintiff's business, although the actual intent —that is, the moral intent to commit fraud, or rather the immoral intent—is not proved. You must have that. It is the unfair appropriation of a portion of the Plaintiff's business which is prevented by injunction. A man may incorporate a company and not carry on business at all, or may carry on a totally different business. Therefore, it seems to me that the whole injunction asked by this writ is simply pursuant to the section of the Act of Parliament. But even if it were otherwise, it would not do. If the affidavits had stated that which I must say, in fairness to the deponents, the affidavits do not state at all— that it was not possible to carry on business under this name without appropriating unfairly a portion of the Plaintiff's business; even then you could not get an injunction, because the answer would be, "That is your opinion, but there is an opinion on the other side that you can do it." And I put a case to illustrate it. Suppose this new company carrying on the business it intends to carry on, establishes itself in *Birmingham* or *Liverpool,* which it may do. It may have its temporary office within a few yards of you, but it may have its registered office somewhere else. What would you say then? It is quite plain that they can carry on business in a way which will not represent their business as being the business of the Plaintiffs, and that, even if they had the same name and not a similar name, they could do it, supposing they put at the top of their prospectus, or at the top of their door, "No connection with any insurance company called the *Universal,* established at such a place, or with any other company of a similar name." I do not say they will carry on business in that way, but they might; and as to injunctions which are called injunctions *quia timet,* it is essential to shew that what the Defendant is about to do must have that effect—not may, but *must.* We are more familiar with them in the cases of interference with light where the proposed plans shew that the building will be such that it must obscure the light. There was a very curious discussion on that subject before Lord *Cottenham* in *Haines* v. *Taylor* (1), where it was sought to prevent the erection of gasworks, on the ground that when erected they would be a nuisance. The Plaintiffs were in this position—that if they had stood by unduly without notice, they might have been barred under the doctrine of acquiescence, by reason of having allowed such a large expenditure; but the answer was, "We are going to erect a building to be used as a gasworks; we say we have an invention to prevent a nuisance; you think we have not, but it may turn out that something may be invented before we begin making gas that may prevent a nuisance. Is it the absolutely necessary consequence of our erecting gasworks that we shall cause a nuisance?" Why should it be predicted as an absolutely necessary consequence that the use of a similar name is a fact which, *per se*, will be calculated to deceive, and that the new company will carry on business in such a way as to unfairly interfere with the Plaintiffs' business? I mention this because I think that it is only a fair warning to the Defendants that if they do they will be liable to an action, and to have an injunction granted against them.

Now, the only other point which I wish to advert to is the excuse which Mr. *Chitty* had for going on with his case after this point was taken and pointed out. He asked me for leave to amend his notice of motion, and to let the motion stand over. I cannot accede to that. There is no Judge more liberal, if I may use the expression, in allowing amendments, in order to try the real case, than I am, at any stage of the case; but I make one exception, that is as to charges of fraud. I do not, as a rule, allow amendments to make a charge of fraud at a time when the case is launched, independently of fraud. I generally stop there. To allow such an amendment as this would be to contravene that rule. Of course, like all my rules, it is not an absolute rule. I may make an exception to it if I see good ground for doing so, but generally it is my rule. Here is a plaintiff coming in under an Act of Parliament who says: "You shall not use a name

(1) 2 Ph. 210.

so similar to mine as to be calculated to deceive." He asks me, having failed because his company was not registered, to change the whole complexion of the suit, and to turn it into a suit to charge the Defendants with the intention of adopting the name and carrying on the business with the view of defrauding the Plaintiff company by unfairly, illegally, and immorally appropriating a portion of the business of the Plaintiff company. Now I cannot allow any such case to be made. Any such case must be made by separate action and by separate notice of motion, and therefore I decline to accede to Mr. *Chitty's* request. The only order I make is that there be no order except that the costs be costs in the action.

C. A.

The Plaintiffs appealed. The appeal was heard on the 29th of March.

Pending the appeal the Appellants put in further affidavits by eminent actuaries and accountants, stating that in their opinion the similarity of the two names must necessarily result in deceiving the public, and leading them by mistake to pay premiums to the proposed new company, such premiums being intended for the "*Universal*" office, whereby serious errors and great loss would result to the latter office.

Chitty, Q.C., and *H. W. Horne*, for the Appellants:—

The Master of the Rolls was under a misapprehension in thinking that our motion was founded on the 20th section of the *Companies Act*, 1862. That is not the case. We only referred to the section as a statutory embodiment of the law on the subject. If we were applying under the Act, it would not be necessary to come to this Court, as the Registrar would take care of us.

This is not a case of two men having the same name setting up the same business, but it is the taking of an invented name so similar to our name as to be calculated to deceive, and with the intention of carrying on a similar business. It is within the principle of *Croft* v. *Day* (1). There is no explanation on their affidavits why they came to take a name so like ours. It is an

(1) 7 Beav. 84.

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act which is calculated to lead to deception, and we are not bound to shew that it must necessarily deceive. Even if the name was taken at the first without any fraudulent intent, yet if they persist in using it after notice that it is calculated to deceive, that is evidence of fraudulent intent: *Orr Ewing & Co.* v. *Johnston & Co.* (1). Our affidavits shew that injury would result to us if this company is incorporated in this name: *Pattisson* v. *Gilford* (2).

[JAMES, L.J.:—Suppose they did not take any business from you, but were wound up within a year: would that be calculated to injure you?]

We submit it would. We were founded in 1834, and have built up a great name and reputation. *Hoby* v. *Grosvenor Library Company* (3) is on all fours with this case.

[They also cited *Braham* v. *Beachim* (4); *Boulnois* v. *Peake* (5); *Seixo* v. *Provezende* (6).]

Roxburgh, Q.C., and *Bond Coxe*, for the Respondents:—

There is no jurisdiction to prevent a man from registering a company with any name he pleases under the *Companies Act*, with a view to trade. It is for the Registrar to object, if he thinks fit. Until the company is registered and is doing business, who is injured? We submit that the Court cannot go solely upon the opinion of experts, but must be satisfied that the necessary result of what is intended to be done must be that the public will be deceived. But how can the Court come to that conclusion until some overt act is done? We are not trading, and we say that we intend so to carry on our business as not to interfere with the Plaintiffs. The application therefore is premature. In all the cases cited business was being carried on. Further, there is no such similarity between the two names as will lead to injury, and the Plaintiffs cannot claim a right to the exclusive use of the word "*Universe*": *Lee* v. *Haley* (7). This case is similar to those of the *Colonial Life Assurance Company* v. *Home and Colonial Assurance Company* (8); *London Assurance* v. *London and West-*

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(1) 13 Ch. D. 434.
(2) Law Rep. 18 Eq. 259, 264.
(3) 28 W. R. 386.
(4) 7 Ch. D. 848.
(5) 13 Ch. D. 513, n.
(6) Law Rep. 1 Ch. 192.
(7) Ibid. 5 Ch. 155.
(8) 33 Beav. 548.

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minster Assurance Corporation (1); *London and Provincial Law Assurance Society* v. *London and Provincial Joint Stock Life Assurance Company* (2), in which an injunction was refused.

JAMES, L.J.:—

I am unable to agree with the view that the Master of the Rolls has taken in this case. No doubt the application is an application *quia timet*, that is to say, it is to prevent something which Lord Justice *Cotton* referred to, in the language of our old pleadings, as being threatened and intended—to prevent something which the Defendant is threatening and intending to do. Now it appears to me that it is made out beyond all possibility of doubt and beyond all possibility of argument, I think substantially, that the Defendant company is threatening and intending as soon as it is registered to transact all the ordinary descriptions of life assurance business, the head office being in *London* under the name and style of the *Universe Life Assurance Association, Limited.* That is clearly what it intends and threatens to do, unless it is restrained by injunction, and with the view of doing this, and as the first step in doing it, it threatens and intends to get itself registered upon the Joint Stock Companies Register under that name. The Plaintiffs' name is the *Universal Life Assurance Society.* Now, is there such a similarity between those names as that the one is in the ordinary course of human affairs likely to be confounded with the other? Are persons likely who have heard of the *Universal* to be misled into going to the *Universe?* I should think, speaking for myself, very likely indeed. Many people do not care to bear in mind exactly the very letters of everything they have heard of, and we have had a great body of evidence before us of persons, whose business it is to be acquainted with these life assurance companies, all of whom concur in deposing in the strongest possible terms that nothing is more calculated to injure an old society of this kind than having a new society established which has got a name so similar to that of the other as that it is likely to be mistaken for it. They say that likelihood exists in this case: that it is likely, morally certain, in fact, that there will follow the results which they describe. Well, that

(1) 32 L. J. (Ch.) 664. 9 Jur NS 843

(2) 17 L. J. (Ch.) 37.

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being so, it seems to me we have everything that is required according to the principles of the Court—all the Court requires is to be satisfied that the names are so similar as to be calculated to produce confusion between the two companies—so calculated to do it that when it is drawn to the attention of those adopting the name complained of that that would be the result, it is not honest for them to persevere in their intention, though originally the intention might not have been otherwise than honest. I think, therefore, these Defendants ought not to be permitted to persevere in their intention, now that they know exactly what it is the Plaintiffs complain, and reasonably complain of; that they ought not to be permitted to persevere in their intention of using that name merely because they say—and that is all they do say in their affidavits—that when they formed the intention of using the name *Universe* in the first instance they had not any idea of stealing the Plaintiffs' name. We may give them credit for that, but when their attention was called to it they ought to have acted immediately upon that notice instead of disregarding it and continuing to use the name. It is said that this is a premature application, but that might be said in every case of *quia timet* where persons always do come to the Court before the mischief is done, and if these Plaintiffs had waited until the Defendant company had actually been registered and had begun its business I know perfectly well the answer to their application would have been: "You are too late; you allowed us to form the company; you allowed the company to be floated and advertised; you allowed us to incur all the expense of that, and now you come down upon us and try to stop us carrying on the business which you knew perfectly well we were going to carry on and had incurred all this expense for." Of course, defendants in these cases always do say "you are too early" in one case, and "you are too late" in the other, but plaintiffs are never too early when the Court is satisfied that the thing which the plaintiff dreads is really and substantially threatened to be done, as in this case. Then it is said that the Court has no right to restrain them from registering the company under this name; that there is a statutory right in any of Her Majesty's subjects to form a joint stock company, and to register themselves in any name they think fit. So far as the

Registrar is concerned they have a right possibly to go to him and say, "Register this company subject to the statutory provision as to similarity of name with that of any other registered company;" but that has nothing to do with the jurisdiction of the High Court to say, "Yes, but you must not do mischief to anybody else." Supposing they had registered in the very name of an existing company, they might say, "We were entitled to do that because we have not registered for the purpose of carrying on the same business, although we have registered in your very name." Then the same thing must apply conversely, and if the new name is so like the other name as to be calculated to deceive, the Court will say they ought not to be allowed to carry on a similar business, and will restrain them from doing so. I am of opinion, therefore, that the order ought to be not that of the Master of the Rolls, but to restrain the Defendant company in the terms of the application.

BRETT, L.J.:—

I also differ from the result at which the Master of the Rolls has arrived; but I hardly think we are differing from him at all as to the law of this matter, and I doubt very much whether we are acting upon the same evidence, or upon evidence which when the case was before him was quite equivalent to that which is now before us. It seems to me clear that the Defendants were intending to carry on under the name of the *Universe Life Assurance Association, Limited,* the ordinary business of life insurance, that they were intending to carry on that business in the ordinary way, which is the same way, therefore, as the Plaintiffs carry on that business, and that they were intending to carry on that business in *London.* It seems to me those are all the intentions on the part of the Defendants which I should upon the facts be inclined to find. I should certainly decline, if my judgment depended upon such a finding, to find that either the Defendants or Mr. *Alexander* had any intention of committing any fraud whatever. I should even decline myself to find that after they knew of the name of the other company, and although they still intended to carry on their own company in the name which they had proposed to adopt, that they even then intended to do anything which is really fraudulent. I have often said I cannot bring my mind to say that, sitting as a

Judge, or in any other capacity, I will ever find a man to be guilty of an intent to be fraudulent unless I am of opinion that he really has a fraudulent mind. If, therefore, this judgment were to depend upon any idea of that kind, of supposing that there was an intentional fraud, either present or future, I should venture to resist; but it seems to me it is not at all necessary, according to the authorities and according to the doctrines of the Court, to suppose there was any intention of fraud existing, or that there would be any in the future. The question is simply whether the name they have adopted for a business of the same kind and in the same city is so like the name of the Plaintiffs, which they have used as their trade name for so long a period, as in fact to enable the Defendants to appropriate, or to result in the Defendants in fact appropriating, a material part of the business of the Plaintiffs' company, by misleading people to suppose that they were dealing with the Plaintiffs when, in fact, they were dealing with the Defendants. The question is whether we can come to the conclusion that that will be, in fact, the effect of their using the name which they propose to use, and that must depend, in the first place, not upon whether the names are identical, but upon whether they are so alike that we are of opinion that in truth and in fact it would have that effect. I do not think that judicially we could decide that as a matter of law. It is a question of fact whether the name is so similar to the other that it would lead to that result in business. It is not a question of law at all, but of fact upon the evidence. We have the evidence before us, and we are here to judge of the effect of that evidence. If the names were identical, I do not say whether one might or not come to a conclusion without any more evidence, but as it is, I think that evidence was admissible and was necessary. Before the Master of the Rolls, it seems to me, that the evidence was rather feeble; there was some evidence before him, but it was feeble; but since then further affidavits by a number of experienced people have been filed. I will call them people experienced in this kind of business, and they have all deposed that the similarity of these two business names is so great that the use of this new name would have the effect of misleading people into supposing, when they were in truth dealing with the Defendants, that they were dealing with the Plaintiffs,—of inducing them to deal with the Defendants, although their desire and wish was to have dealt with the Plaintiffs on account of the character which had been acquired by their name. That evidence was put in upon affidavits filed, and was called to the Defendants' attention a long time ago, but from reasons of their own they have wholly abstained from answering it. That evidence seems to me to be satisfactory evidence of the fact, and therefore I think we ought to come to the conclusion, as I do as a matter of fact, that the similarity of the names would in truth have that effect. That seems to me all that it is necessary to decide. It is possible, no doubt, as a matter of possibility, that it would not, but that is not the case here upon the evidence; the question is whether we are of opinion, sitting as a tribunal judging of the fact, that it will—not whether it is possible it might not, but whether in truth it will; and that, to my mind, is made out. Then it is said this is an application for an injunction *quia timet*, and that it ought not to have been made under the Act, and that the Master of the Rolls so held. But that does not seem to me to have been the ruling of the Master of the Rolls. He seems to have thought the application might have been made *quia timet*, but that the evidence before him was not sufficient. The case before Vice-Chancellor *Hall* seems to me to be precisely in point. With regard to the other proposition, that we could not restrain these parties from applying to be registered, it seems to me that the application to be registered is a step in carrying into effect the intention and a part of the injury, and that therefore this Court can prevent the Defendants, and enjoin them from making that application. The whole application, therefore, for an injunction in this case ought to be granted.

COTTON, L.J.:—

The first point urged by the Respondents here was in the form of a preliminary objection, and though we did not so regard it, the Master of the Rolls seems to have thought it fatal to the application. That objection was that the application was under the 20th section of the *Companies Act*, 1862, and that it could not therefore be made, the company not being registered. It is an application for an injunction made in an action brought to enforce a well-known equity, viz., to prevent the Defendants from doing that which is calculated to mislead the public and lead them to think that the Defendant company is the company of the Plaintiffs. The question is whether that is made out. But before I deal with that, I will deal with another objection which has been considerably pressed, viz., that this action was premature. The company, it is said, does not exist and does not carry on business; and that it is premature to apply for an injunction when you do not know how the company will carry on its business. But the principles of the Court are opposed to that argument. No doubt the Court must be satisfied on the evidence that injury will result from the acts which the Defendant threatens and intends to do, to adopt the technical language of the old pleadings in bills of complaint, which Mr. *Roxburgh* rather objected to my using. If the Court is satisfied that the Defendants intend to do acts which, as far as all reasonable probability goes, will interfere with the rights which the Plaintiffs have, then, in my opinion, it was the old established practice of the Court of Equity, and is the duty of the Court now, not to wait until injury is done, when a Court of Law would have granted damages, but to interfere by way of prevention and stop that from being done which, if done, would be an injury to the Plaintiffs. There was mixed up with this argument this question: It was said, how can you tell that the company will carry on its business in such a way as to cause any injury? The Master of the Rolls, in his judgment, has referred to a case where there was an application made to stop a gasworks from being erected. There the question depended upon this, whether there would be a nuisance arising from the manufacture of the gas, and, according to the defendant's case, the gas would be manufactured by a process which would prevent any nuisance whatever, so that it depended there upon the gas being manufactured in such a way as to prevent injury. But this is not like a case where the Court is asked to interfere in the erection of a building of that description; it is asked here to restrain the Defendants from doing certain acts which, if done, will be an interference with the rights of the Plaintiffs. What is the result upon the evidence? In my opinion the result is this: That what the Defendants will do, if they are not restrained, will cause confusion and will induce people, or be the means of inducing people, who desire to insure in this long-established society of the Plaintiffs', to insure in the Defendants' office instead. That, in my opinion, is the result of the evidence. It is said that possibly they may carry on their business in some other way; but what we have here is, that although this company is not registered and is not carrying on business, it has put forth to the world, to induce the public to join as shareholders, a prospectus in which it states how it intends to carry on its business. Are we, therefore, without any evidence to the contrary as to the mode in which they are going to carry on their business, to say that this application is premature? The result must be that the intention of the Defendants is to be deemed to be to carry on their business in the way their prospectus states that it is to be carried on, that there is a head office in *London*, with various agencies and branches in *England* and the Colonies; and that, in my opinion, coupled with the similarity of the name, is sufficient to lead to the conclusion that what they are going to do is calculated to deceive, and will deceive, the public to the prejudice of the Plaintiffs. But it is said, "Why should not they have their offices in a part of *London* distant from that where the Plaintiffs have their office?" If they had been selling butter or cheese, or some such article, it would have been material to consider in what part of *London* their office is to be; but when an insurance office starts by stating that it intends to carry on its business not only in *London* but throughout the *United Kingdom*, and in all parts of the world, and the Plaintiffs do the same, then I think it is very immaterial in what part of *London* they intend to establish their head office. This is a very different case, therefore, from that of the *Guinea Coal Company*, which has been referred to (1). I will say one word further as to the intent of the Defendants. In my opinion it is not necessary that in taking the name they have, there should have been any fraudulent intent; but whether there was a fraudulent intent or not, everybody is responsible for the reasonable consequences, upon facts known to him, of what he is doing. It is hardly possible to suppose

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(1) *Lee* v. *Haley*, Law Rep. 5 Ch. 155.

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that Mr. *Alexander*, if not the persons associated with him, did not know all the facts connected with the adoption of this name—*Universe Life Assurance Association;* and even if they did not, immediately after the first advertisement of the company appeared in the *Times*, an application was sent to the Defendants pointing out the consequences of what they were doing, and therefore, even if they had been unaware of it before, their attention was then called to the fact that those would be the consequences, and it was wrong on the part of the Defendants to persist afterwards in the use of the name which they had taken. There is only one other point, viz., whether the Plaintiffs are entitled to the whole of the injunction they ask. It is said there is a statutory right to register. Yes, there is a statutory right, provided the person who is doing it is not in doing it violating some other right, or offending against the law. If he is, this Court has the most perfect right to stop him from doing so, just as it had a right of stopping him from going to a Court of Law; though it has no right to prevent a Court of Law from entertaining his suit. Here one of the grounds for applying to this Court is that the Registrar, who registers on application the names of limited companies, could not, under the Act, have refused to register this company on the ground that the particular section of the Act only applies to similarity with the name of a company already registered. If, therefore, the Court is satisfied, as we are in this case, that what the Defendants intend to do will be a wrong to the Plaintiffs, the Court is entitled to prevent the very first step in the wrongful act being taken. The appeal must be allowed with costs.

Solicitors for Appellants: *Pollock & Co.*
Solicitor for Respondents: *W. F. Nokes.*

M. W.

Applied. GEORGE *v.* TOMPSON'S TRUSTEE. [1949] 1 All E.R. 554.

Considered. GEORGE *v.* TOMPSON'S TRUSTEE. **[1949] 1 Ch. 322.**

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Feb. 28.

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April 28;
May 5.

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18 Ch D 14

Bankruptcy — Protected Transaction — Dealing with Bankrupt—Attachment against Goods of Bankrupt—Garnishee Order—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 94 (*sub-s.* 3), 95 (*sub-s.* 3).

A garnishee order, attaching a debt due to a bankrupt, is not a "dealing" with the bankrupt within sect. 94, sub-sect. 3, of the *Bankruptcy Act*, 1869.

Whether such an order is "an attachment against goods" of a bankrupt within sect. 95, sub-sect. 3, *quære*.

But, if it is, it is not within the protection of sect. 95, sub-sect. 3, unless the garnishor has obtained actual payment of the attached debt from the garnishee before the order of adjudication.

Decision of *Bacon*, C.J., reversed.

Leave to appeal to the House of Lords refused.

ON the 14th of August *Curtoys*, a brewer at *Bath*, committed an act of bankruptcy by departing from his place of business with intent to defeat or delay his creditors.

On the 30th of August *William Henry Tagart* recovered a judgment against *Curtoys* for £167 11*s.* 8*d.* and costs, and on the 1st of September he obtained a garnishee order *nisi* against *Charles King*, attaching all debts due to *Curtoys* in *King's* hands.

On the 2nd of September the order *nisi* was served on *King*, and on the 15th of September it was made absolute.

On the 3rd of September a bankruptcy petition was filed by *Alfred William Pillers* against *Curtoys*, under which he was, on the 25th of September, adjudicated a bankrupt, the act of bankruptcy alleged being that committed on the 14th of August.

On the 23rd of October *Pillers* was appointed trustee.

On the 16th of December, 1880, an application was made to the County Court at *Bath* on behalf of the trustee, for an order declaring that the garnishee order was void and of no effect as against him, on the ground that prior to such order the bankrupt had committed an act of bankruptcy to which the title of the trustee related back; also on the ground that the payment ordered to be made by the garnishee (*King*) to the judgment creditor (*Tagart*) was not an unconditional payment, but was to be made only on completion of a purchase of land by *King* from *Curtoys*, which at the time of the bankruptcy was not completed, and that consequently the moneys payable by the garnishee to the bankrupt were not, as against the trustee, bound by the garnishee order.

The County Court Judge was of opinion, first, that by the service of the garnishee order *nisi* before petition and adjudication, the judgment creditor obtained a perfectly valid security which was wholly independent of any prior act of bankruptcy by the judgment debtor; secondly, that if this were not so, then that the security was valid, inasmuch as the judgment creditor had not, at the time of the service of the order, notice of the prior act of bankruptcy; and, further, that the order was a " dealing with " the bankrupt within the protection of the 3rd sub-section of sect. 94 of the *Bankruptcy Act*, 1869. He accordingly dismissed the application.

The trustee appealed. The appeal was heard before *Bacon*, C.J., on the 28th of February, 1881.

Winslow, Q.C., and *Finlay Knight*, for the Appellant:—

The case is believed to be new and untouched by authority; the question being whether the garnishor is a secured creditor within sub-sect. 5 of sect. 16; in other words, whether a garnishee order is a good security within the meaning of the section.

The trustee's first contention is, that on the 1st of September there was no debt due from *King* to *Curtoys*, hence nothing that the garnishee order could attach; next, that if anything was due, the transaction, unless it could be brought within the protection of either sect. 94 or 95 of the Act, must fail, just as a bill of sale or any other security given by *Curtoys* after the commencement of bankruptcy, must fail. Sub-sect. 3 of sect. 15 makes divisible amongst the bankrupt's creditors all such property as may belong to or be vested in the bankrupt "at the commencement of the bankruptcy"; and sect. 11 declares that the bankruptcy "shall be deemed to have relation back to, and to commence at the time of, the act of bankruptcy being completed, on which the order is made adjudging him to be bankrupt." Several cases were referred to in the learned County Court Judge's judgment, but they were all cases in which the garnishee order was obtained before the commencement of the bankruptcy. But where, as in *Wadling* v.

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Oliphant (1), the debt was contracted after the bankruptcy, a garnishee order was held void, and the trustee was declared entitled to the money. So, in *Stevens* v. *Phelips* (2), a fund in Court, paid in by executors, after they had been served with a garnishee order obtained by a judgment creditor of their testator, was held not attachable—on the ground that at the time when the executors were served there was no debt in their hands due to the judgment debtor. In *Hirsch* v. *Coates* (3) a garnishee order was held not applicable to a debt after it had been assigned by the judgment debtor.

Supposing, however, that there was a debt due from *King* to *Curtoys* on the 2nd of September, was a judgment creditor of the bankrupt, who had obtained an order attaching the debt in the hands of *King*, a protected creditor within either the 94th or the 95th section? Reliance appears to have been placed in the Court below upon *Krehl* v. *Great Central Gas Consumers Company* (4). But that case is clearly distinguishable. There the "transaction" was complete before the act of bankruptcy was committed. It was a decision under sect. 133 of the Act of 1849 (12 & 13 Vict. c. 106), which contained the word "transactions"—a term which has been omitted from sects. 94 and 95 of the *Bankruptcy Act*, 1869. The word relied upon by the County Court Judge was "dealing"—"any contract or dealing." But if a mere seizure should be held to be a dealing, then the 95th section is in a great measure superfluous. Seizure by a judgment creditor cannot be put higher than a seizure by the sheriff. Then, again, the attachment spoken of in sub-sect. 3 of sect. 95 must be executed by "seizure and sale." If seizure alone were to be held to give the security contended for, the words "and sale" must be excluded from the statute, and the purport of the clause would be defeated. If seizure alone is sufficient the appointment (since the Judicature Acts) of a receiver alone would be just as good a "dealing with" the bankrupt as garnishing a debt. But the appointment of a receiver is not a "dealing with" the bankrupt: *Ex parte Evans* (5).

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(1) 1 Q. B. D. 145.

(2) Law Rep. 10 Ch. 417.

(3) 18 C. B. 757.

(4) Law Rep. 5 Ex. 289.

(5) 11 Ch. D. 691; 13 Ch. D. 252.

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A notice given to the sheriff that goods seized by him belong, not to the debtor, but to the person giving the notice, is not a "dealing with" the bankrupt within the section: *Ex parte Dorman* (1).

Roxburgh, Q.C., and *A. R. Poole*, for *Tagart*:—

If the case comes within sub-sect. 3 of sect. 94, then, inasmuch as two things are spoken of, "contracts" and "dealings"—"contracts" must mean bargains to which the bankrupt must be one of the parties, and "dealings" must mean transactions affecting his property to which he is not a party. If the assent of the bankrupt be necessary to make a dealing, then the word is unnecessary. "Dealing" is a comprehensive term, and means an operation affecting the bankrupt's property with which the bankrupt himself has nothing to do.

[BACON, C.J.:—But the words are, "Any contract or dealing with any bankrupt."]

Those words mean "any contract with the bankrupt, or any dealing with the bankrupt's property."

The contention on the other side amounts to this—that though a creditor may take his debtor's land, or may seize and sell his goods, he may not attach his debt, if an unknown act of bankruptcy has been committed within twelve months before. It is not surprising that no such decision has ever been given, and that no attempt to set up such a doctrine has ever been made. The effect would be to suspend the operation of every garnishee order for twelve months, less one day, and render it practically valueless.

But if the transaction be not a "dealing," then the case is governed by sub-sect. 3 of sect. 95. This is an attachment against the goods of a bankrupt, executed in good faith by seizure, not sale, before the date of the adjudication, and without notice of any act of bankruptcy. It will not be disputed that a debt due to a bankrupt is a portion of his "goods."

[BACON, C.J.:—That point was decided more than a hundred years ago.]

The object of inserting the words "seizure and sale" was to give to the attaching creditor the absolute property in the goods. The same result is attained, with regard to a debt, by attaching it by means of a garnishee order.

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(1) Law Rep. 8 Ch. 51.

Attachment by seizure only, of a debt, is equivalent to attachment by "seizure and sale" of other kinds of goods. That the absolute property in the debt passes by force of the order is shewn from *Ex parte Joselyne* (1); and that the holder of a garnishee order is a "secured creditor" within the meaning of sect. 16, sub-sect. 5, appears from *Emanuel* v. *Bridger* (2).

Wadling v. *Oliphant* (3) was a case of after-acquired property, and has no application. In *Stevens* v. *Phelips* (4) the fund in the hands of executors had been paid into Court. That case, as well as *Hirsch* v. *Coates* (5), has no application. The scheme of the statute seems to be that the same relief against debts is to be given by attachment as is given against lands by an *elegit*, and against chattels by an execution. The garnishee order cannot be disturbed by an act of bankruptcy of which the creditor had no notice.

Winslow, in reply:—

In order to bring this transaction within the 3rd sub-section of sect. 95, some particular words must be found applicable to it. How is the word "sale" to be got rid of? If the money had been paid, the question would have been a different one. If the creditor is not protected by the 95th or by the 94th section, the property belongs to the trustee.

BACON, C.J.:—

In the course of the learned argument that has been addressed to me in this case it was stated, and I think not without reason, that the question is one of some difficulty and nicety. My decision with respect to it must depend on the *Bankruptcy Act*, and upon nothing else; for though no general Act can be held to interfere with or affect the *Bankruptcy Act*, yet the *Bankruptcy Act* appeals to the general law throughout. It does not alter the general law, but it applies the provisions and incidents of the general law to transactions arising in bankruptcy. General Acts,

(1) 8 Ch. D. 327, 330.

(2) Law Rep. 9 Q. B. 286.

(3) 1 Q. B. D. 145.

(4) Law Rep. 10 Ch. 417.

(5) 18 C. B. 757.

such as the *Common Law Procedure Act* and the *Judicature Act*, express the law of the land, and when, in reading the *Bankruptcy Act*, you have to ascertain what is the general law, you read it out of those two statutes, and out of the others that apply to the general enactments of the law.

It is said that this is the first time that the point has arisen. For myself, I do not recollect any case of a similar kind; and, since it has been said to be a nice and difficult question, it is high time it was decided in order that, if it be considered advisable, it may be taken to a higher Court for the purpose of rectifying the judgment I am about to pronounce.

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The former Bankruptcy Statutes contained two very severe principles of law, one relating to "order and disposition," by which chattels left in the apparent possession of a man who had become bankrupt were forfeited by the real owner if he had left them in the bankrupt's order and disposition. The other was the doctrine of relation back. Both of those principles are observed in the existing *Bankruptcy Act;* but the order and disposition clause has undergone remarkable modification, variation, or relaxation. The doctrine of relation back of the trustee's title to an earlier act of bankruptcy than that upon which the adjudication proceeded, appears in the first instance to be without qualification, and a more unjust law than that, if subject to no modification, can hardly be conceived, for it would result in this, that, within the requisite number of months before a man became a bankrupt, every one of his transactions might be ripped up, and persons who had dealt with him in good faith might lose the fruits of their dealings, and forfeit them for the benefit of the creditors. That, however, is not strictly the meaning of the doctrine, because not only do the 12th and 16th sections recognise the rights of creditors holding security, but when you come to the 94th and 95th sections, you find the 94th section preceded by these words, "Nothing in this Act contained shall render invalid," and then follows a list of transactions to which invalidity is not to be imputed. Keeping that in mind, and recollecting how much the severity of the doctrine of relation back is qualified by the subsequent clauses of the Act, I have to see how it stands with regard to the facts of this case.

It has been decided beyond possibility of doubt that a man who gets a garnishee order against his debtor obtains thereby a security. The clauses which have been referred to, especially the third subsection of the 95th section, provide "that any execution or attachment against the goods of any bankrupt executed in good faith by seizure and sale before the date of the order of adjudication" shall be valid, provided that "the person on whose account such execution or attachment was issued had not at the time of the same being executed by seizure and sale notice of any act of bankruptcy committed by the bankrupt and available against him for adjudication." That the debt due from *King* to the bankrupt is part of the bankrupt's "goods," is not, in my mind, open to question. That the garnishee order is an "attachment" in the full technical legal sense of that word I entertain no doubt, if the order was obtained before the adjudication was made, for it has also been conclusively decided that the obtaining of that order *nisi* is the completion of the judgment creditor's security, unless at the time of making it absolute some cause be shewn against it, of which there is no trace here. In the very words, then, of the 3rd sub-section of the 95th section, I find in this case that there was an attachment against the goods of the man who has become bankrupt. I have not heard it doubted or questioned that it was an execution in good faith by seizure. The property is incapable in its nature of being dealt with by sale. There may be executions and attachments which cannot be effected by sale; this is one of them, and it took place before the date of the order of adjudication. The statute, therefore, seems to me completely to cover the case. As to the authorities that have been referred to, that which struck me most was the case of *Wadling* v. *Oliphant* (1). I thought at first that it was an authority governing the question, but I find it is not; for I am satisfied that the attachment there was long after the bankruptcy, which, though the judgment creditor contends he had no notice of it, is notice to everybody concerned, and hence beyond all question after the title of the trustee had accrued. There cannot be any attachment of a bankrupt's goods. There can be no garnishee to a bankrupt. The garnishee is garnishee to the trustee, and therefore the decision in that case was perfectly con-

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(1) 1 Q. B. D. 145.

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sistent with principle, and I believe reconcilable with every case that has been referred to. Then the single question before me is, whether a man, who obtains a garnishee order before he has any notice of an act of bankruptcy committed by the debtor, and before any order of adjudication has been made, does not acquire a possessory right to the fruits of the order; that is, whether he has not obtained in every sense of the word a security for his debt. Having obtained the order before notice of any act of bankruptcy, I think he has obtained a security for his debt before any time at which the trustee's title could arise, for the 95th section neutralizes the effect of the 11th section about the relation back to any previous act of bankruptcy. I have come, therefore, to the conclusion that the order appealed against is a perfectly right order, and that I can do nothing but dismiss the appeal with costs.

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From this decision the trustee appealed. The appeal was heard on the 28th of April and the 5th of May, 1881.

Winslow, Q.C., and *Finlay Knight*, for the Appellant:—

In the cases hitherto decided as to the effect of garnishee orders, the order had been served before the commission of any act of bankruptcy, and in such cases it has been held that the service of the order creates a good security in favour of the garnishee. But by sect. 11 of the *Bankruptcy Act*, 1869, the title of the trustee in the bankruptcy relates back to the act of bankruptcy on which the adjudication is made. Sects. 94 and 95 (1) protect certain

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(1) Sect. 94 provides that "Nothing in this Act contained shall render invalid (*inter alia*)

"(3.) Any contract or dealing with any bankrupt made in good faith and for valuable consideration, before the date of the order of adjudication, by a person not having, at the time of making such contract or dealing, notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication."

Sect. 95 provides that, "Subject and without prejudice to the provisions of this Act relating to the proceeds of the sale and seizure of goods of a trader, and to the provisions of this Act avoiding certain settlements, and avoiding, on the ground of their constituting fraudulent preferences, certain conveyances, charges, payments, and judicial proceedings, the following transactions by and in relation to the property of a bankrupt shall be valid, notwithstanding any prior act of bankruptcy (*inter alia*),

"(2.) Any execution or attachment against the land of the bankrupt, executed in good faith by seizure before the date of the order of adjudication, if

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transactions entered into before the adjudication and without notice of the act of bankruptcy.

The issuing of a garnishee order cannot be a "contract or dealing" with the bankrupt within sect. 94, sub-sect. 3. If the attachment is protected at all, it must be under sect. 95, sub-sect. 3, but then there must have been a "seizure and sale" before the adjudication. The word sale is not applicable to a debt which is attached, and this shews that the word "goods" is not intended to include a debt.

[JAMES, L.J., referred to *Ex parte Abbott* (1).]

There it was held that an *elegit* was a security under sect. 12, and that it was not within sect. 87, but the seizure was before the act of bankruptcy. By virtue of the relation back of the trustee's title the attached debt had become the debt of the trustee, and was no longer a debt due to the bankrupt: *Ex parte Duignan* (2).

[JAMES, L.J.:—We must read sect. 95 as meaning goods which, but for the bankruptcy, would have been goods of the bankrupt, otherwise there would be no protection at all.]

The word "goods" does not include a debt. The words of sect. 133 of the Bankruptcy Act of 1849 (12 & 13 Vict. c. 106), and of sect. 81 of the Act 6 Geo. 4, c. 16, were substantially the same as those of sect. 95, sub-sect. 3, and when the words were first used goods could be attached by virtue of the custom of *London*, and ultimately sold in default of payment of the debt claimed.

[LUSH, L.J.:—The goods were not sold under the attachment.]

They were sold in consequence of it; it was the first step in the

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the person on whose account such execution or attachment was issued had not at the time of the same being so executed by seizure notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication.

"(3.) Any execution or attachment against the goods of any bankrupt, executed in good faith by seizure and sale before the date of the order of adjudication, if the person on whose account such execution or attachment was issued had not at the time of the same being executed by seizure and sale notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication."

(1) 15 Ch. D. 447.

(2) Law Rep. 6 Ch. 605.

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proceedings. This kind of attachment is sufficient to satisfy the words. An attachment of a debt by a garnishee order was not known at the time when the words were first used, and there is no reason for extending the meaning of the words now.

In *Holmes* v. *Tutton* (1) it was held that the service of a garnishee order *nisi* under sect. 62 of the *Common Law Procedure Act*, 1854, did not create such a security as was excepted from the operation of sect. 184 of the *Bankruptcy Act*, 1847. Other cases on the point are *Stevens* v. *Phelips* (2); *Wadling* v. *Oliphant* (3); *Hirsch* v. *Coates* (4). They all shew that a garnishee order has no operation on a debt which has ceased to belong to the judgment debtor at the time of the service of the order.

[JAMES, L.J., referred to *Levy* v. *Lovell* (5).]

The question of the act of bankruptcy did not arise there; the present case is the first which has raised that point. The words "seizure and sale" cannot be got over. Either the debt is not within the word "goods," or, if it is, nothing equivalent to a "sale" has taken place. And in the case of a seizure and sale of goods under a *fi. fa.*, if the bankrupt is a trader, the creditors have still under sect. 87 an opportunity of getting the proceeds of the sale of the goods.

Roxburgh, Q.C., and *C. Ruscombe Poole*, for the judgment creditor:—

[JAMES, L.J., referred to *Ex parte Rayner* (6), in which it was held, under sect. 87, that though the sheriff had not sold the goods when the petition was filed, the trustee in the liquidation was entitled to them.]

Ex parte Abbott (7) shews that where, as in the case of an *elegit*, a sale is not necessary to complete the title of the creditor, but the goods are delivered to him in satisfaction of his debt, sect. 87 does not apply. Under sub-sect. 2 of sect. 95, in the case of land, all that is required is that there should have been a seizure before the adjudication. The principle is that the creditor must, before the

(1) 5 E. & B. 65. 1 Jur. N.S. 975
(2) Law Rep. 10 Ch. 417.
(3) 1 Q. B. D. 145.
(4) 18 C. B. 757.
(5) 14 Ch. D. 234.
(6) Law Rep. 7 Ch. 325.
(7) 15 Ch. D. 447.

adjudication, have done all that he can to complete his title. And so, in sub-sect. 3, all that is meant is that there must be a sale when a sale is necessary to complete the process. In the case of an attachment by a garnishee order a sale is unnecessary, and, indeed, there cannot be a sale. But the title of the garnishee as against the judgment debtor is completed by the service of the garnishee order *nisi*: *Emanuel* v. *Bridger* (1); *Ex parte Joselyne* (2). Then Lord Justice *James* said (3): "The moment the order of attachment was served upon the garnishee the property in the debt due from him was absolutely transferred from the judgment debtor to the judgment creditor . . . . The property in the debt was transferred, and there was a complete and perfect security the moment the order of attachment was served."

[JAMES, L.J.:—No question arose there upon sect. 95.]

The creditor has done all that he can to complete his remedy, and that being so the words of the sect. 95 are satisfied.

[JAMES, L.J.:—I believe that when the words "attachments against the goods and chattels of such bankrupt" were used in sect. 81 of the Act 6 Geo. 4, c. 16, the Legislature had in view the equitable process of attachment in the Court of Chancery whereby goods which had been sequestrated to compel obedience to an order for the payment of money could ultimately, in the event of non-payment, be sold for the purpose of paying the money.]

The seizure and sale of goods under an execution is made an act of bankruptcy; an attachment of a debt is not. In the case of *elegits* it has been held with reference to the *Judgment Act* of 1864 (27 & 28 Vict. c. 112), that actual delivery in execution is unnecessary in the case of equitable interests in land, because it is not applicable to such interests; it is enough that there should be such a delivery as the thing is capable of: *Hatton* v. *Haywood* (4); *Anglo-Italian Bank* v. *Davies* (5); *Ex parte Evans* (6). So, in the present case, the creditor has done all that he can to make the attached debt his own, short of actual payment to him. As far as the bankrupt was concerned nothing remained to be done; the garnishee could not pay the debt to any one but the judgment creditor: *In re Stanhope Silkstone Collieries Company* (1).

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(1) Law Rep. 9 Q. B. 286.
(2) 8 Ch. D. 327.
(3) Ibid. 330.
(4) Law Rep. 9 Ch. 229.
(5) 9 Ch. D. 275.
(6) 13 Ch. D. 252.

JAMES, L.J.:—

I think it is impossible to assent to the conclusion of the Chief Judge, and indeed I am unable to agree with the view either of the County Court Judge or of the Chief Judge. An attachment issued *in invitum* cannot be said to be a "dealing" with the man who is suffering it against his will. In order, therefore, that the attachment may be protected it must be brought within the exact words of sub-sect. 3 of sect. 95, or within their reasonable meaning. The section says that the attachment must have been perfected by seizure and sale before the date of the order of adjudication. This particular attachment is not capable of being realized by seizure and sale; a debt attached under a garnishee order is not capable of being sold. Therefore, it is not within the words of the section. It is said that some of the words do apply, and that we must give a meaning to the word "attachment." Without giving a final opinion on the point, my strong impression is that goods in the strict sense of the words, goods and chattels which are capable of being sold, are alone within the clause. I was at first impressed with the suggestion that there was nothing of that nature which was capable of being "attached" for the purpose of paying a debt. But the same words occur in the Act 6 Geo. 4, c. 16. I believe that the Legislature had then in view the equitable process of execution in a Court of Equity under which goods could be sequestrated and sold for the payment of a sum of money which had been ordered by a decree of the Court to be paid. The Defendant was first attached for his contempt, and then a sequestration could be issued against his goods. This was in the first instance only an attachment to compel payment. But, after a certain time, if that process was not successful in obtaining payment of the money, an application could be made for the sale of the goods which had been thus attached and payment of the money out of the proceeds of sale. Therefore, when the words were first used in a Bankruptcy Act, there was something in the nature of an attachment of goods to which they applied, and this was sufficient to satisfy all the words of the clause. But, if the words in the present Act are to be taken to apply to an attachment of a debt under a garnishee order, we must give to the words "executed by seizure and sale" a meaning applicable to that, and then the only equivalent to a sale of goods would be the realizing of the attachment by payment of the attached debt to the garnishee. So long as the thing remains *in fieri*, so long as the security is unrealized, we cannot put an attachment of a debt in any higher position than a seizure of goods by the sheriff without any sale. This is sufficient to dispose of the case.

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(1) 11 Ch. D. 160.

BAGGALLAY, L.J.:—

I agree that the appeal must be allowed. If the debt was part of the goods of the bankrupt I think it is clear that, in order that the attachment should be protected by sect. 95, sub-sect. 3, it must have been executed by seizure and sale. If the debt was not part of the goods of the bankrupt the attachment does not come within the operation of the section. It is not material to decide which is the right view, but as at present advised I agree with Lord Justice *James* in thinking that the debt was not part of the goods of the bankrupt. Similar words are to be found in the protecting clauses of the Bankruptcy Acts at least as early as the Act 6 Geo. 4, c. 16, though no such thing as an attachment of a debt by a garnishee order was then in existence. Attachments of goods in the Lord Mayor's Court were well known then, and also attachments to compel the payment of money ordered to be paid by a decree of the Court of Chancery, but such attachments were not sufficient to support a commission of bankruptcy unless they had been followed up by an order for the sale of the goods attached. I am clearly of opinion that the garnishee order was not "a dealing with the bankrupt" within sect. 94, sub-sect. 3.

LUSH, L.J.:—

I entirely agree with my learned colleagues, that it is not necessary for us to decide on the present occasion whether sub-sect. 3 of sect. 95 does or does not apply to an attachment of a debt by a garnishee order. But I do not wish it to be supposed that I agree with them in their view of the construction of the sub-section. I think that we are bound to give full effect to every word

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of the clause, and, although when the words were first used in the Bankruptcy Statutes, there was no such thing known as an attachment of a debt by a garnishee order, yet, when the Act of 1869 was passed, that process had come into existence under the *Common Law Procedure Act* of 1854, and I cannot help thinking that, whatever may have been the meaning of the words "attachment against goods" in the former Bankruptcy Acts, yet in the present Act the word must be taken as embracing an attachment under a garnishee order, which was a process well known at the time when the Act was passed. Sub-sect. 2 of sect. 95 deals with executions or attachments against land of the bankrupt, and sect. 3 deals with executions or attachments against his goods (the word "chattels" is not used). I think the two clauses were intended to deal with all the property of the bankrupt which passes to his trustee. The word "goods" may well include debts, and I think we ought to take it as including debts. If it does not include debts, they are not within sub-sect. 3 at all. But, if the word does apply to debts, then I think the fallacy of the Respondent's argument consists in treating the debt attached as having been the debt of the bankrupt at the time when the garnishee order was served. By virtue of the adjudication of bankruptcy and the relation back of the trustee's title, all the property which the bankrupt had at the time when he committed the act of bankruptcy is vested in the trustee and becomes divisible among the creditors. The debt had, therefore, ceased to be due to the bankrupt and had become due to the trustee. Then this clause was inserted for the protection of a creditor who, after the commission of an act of bankruptcy of which he had no notice, a secret act of bankruptcy, had pursued his remedy, but it protects him only upon certain conditions. Goods seized under a *fi. fa.*, goods in the ordinary popular sense of the word, must not only have been seized, but sold, before the adjudication. The intention was that so long as the execution remained only a security for the debt, it was not to be protected. Something more must have been done; there must have been an actual conversion of the security into money. And I think we must find some equivalent for that in the case of an attachment under a garnishee order. What is the equivalent? The security must have been realized before there can be any protection. How can the garnishor realize the debt which he has attached? The debt cannot be sold, and he can only realize it by obtaining payment of it from the garnishee, either voluntarily or by means of an execution on his goods. Till that has been done I think there is no protection. It is true the words "executed by seizure and sale," have no application to the case. But I think they do shew what was the meaning of the Legislature clearly enough to enable us to apply the principle, and if for want of apt words in the section we were to say it does not apply to a garnishee order, we should be incurring the censure which is implied in the maxim *qui hæret in literâ hæret in cortice.* I am of opinion that the only equivalent for an actual sale of goods which will satisfy the words of the Act in the case of a garnishee order is an actual receipt of the attached debt by the garnishor. Till that has been done the attachment is only a security, and it is not protected by sect. 95.

JAMES, L.J. :—

I wish to add that if the case should ever arise of an actual receipt of the money by the garnishor, it remains entirely unprejudiced by our present decision.

LUSH, L.J. :—

I agree that that is so.

Roxburgh, Q.C., asked for leave to appeal to the House of Lords.

JAMES, L.J. :—We never encourage appeals for such a small amount.

LUSH, L.J. :—None of us entertains the least doubt of the correctness of our decision.

Solicitors for Appellant: *B. H. Van Tromp*, agent for *Benson & Carpenter, Bristol.*

Solicitors for Respondent: *Whitakers & Woolbert*, agents for *Simmons, Clark, & Collins, Bath.*

J. B. D.
W. L. C.

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May 12.

Ex parte YOUNG. *In re* KITCHIN.

Principal and Surety—Judgment against Principal—Liability of Surety.

In the absence of special agreement a judgment or an award against a principal debtor is not binding on the surety, and is not evidence against him in an action against him by the creditor, but the surety is entitled to have the liability proved as against him in the same way as against the principal debtor.

The American case *Douglass* v. *Howland* (1) followed.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

Joseph Kitchin and *Alphonse de Martelly* carried on the business of wine merchants in *London* as *A. de Martelly & Co.*, and the *Pelican Bottling Company.*

On the 22nd of January, 1877, an agreement was entered into between them and Messrs. *Emile & Frederic Cantor* of *Mayence*, in *Germany*, whereby it was provided that, in consideration of Messrs. *Cantor* appointing *Martelly & Co.* their sole agents, and relieving *A. de Martelly*, their then present representative, of his existing contract with them, dated the 20th of October, 1873, an agreement was thereby entered into between the contracting parties, to remain in force for three years beginning from the 1st of January, 1877, and ending on the 31st of December, 1879, subject to a mutual notice of discontinuance of six months previous to the end of the contract; and, should this notice be omitted on either side, the contract to remain in force from year to year until such notice should be duly given. *Martelly & Co.* engaged to take all German wines to the average amount of at least £2000 per annum during that time from Messrs. *Cantor* at their wholesale price list. Orders given during the one month were to be drawn for at six months' date on the 1st day of the following month, the bills being duly accepted and made payable in *London*. Should the orders of any one month amount to less than £50 no bill was to be drawn until the first day of the following month, when it should be drawn for whatever the amount might be. There were some provisions as to the sending of travellers to customers and calling on customers, and there was the following arbitration clause: "Should any dispute arise between these contracting parties the same is to be arranged by arbitration, and if the arbitrators do not agree they are to call in an umpire whose decision shall be final for all parties concerned, such arbitrators and umpire to be exclusive of the legal profession, and this to be made a rule of Court of any of the Divisions of the High Court of Justice upon the application of either of the contracting parties." In December, 1877, *Joseph Kitchin* retired from the firm of *Martelly & Co.*, and his son *Walter Kitchin* became a partner in his stead. Upon hearing of this change in the firm Messrs. *Cantor* objected to continue supplying wines to the new firm, unless *Joseph Kitchin* would give a guarantee for the due fulfilment by the new firm of the agreement of January, 1877, and ultimately, on the 12th of July, 1878, *Joseph Kitchin* signed a letter addressed to Messrs. *Cantor*, by which he requested them to consent to treat the agreement of January, 1877, "as made between the *Pelican Bottling Company*, now consisting of my son Mr. *Walter Kitchin* and Mr. *Alphonse de Martelly*, on one side, and yourselves, on the other side, and in consideration thereof I undertake and guarantee that all wines supplied to them by you shall be duly paid for, and that the said agreement shall be otherwise duly performed in all respects on their part." After this Messrs. *Cantor* continued to deal with the new firm of *Martelly & Co.* on the terms of the agreement of January, 1877. Disputes afterwards arose, and Messrs. *Cantor* alleged that there had been breaches of the agreement by the new firm, and they claimed a reference to arbitration under the agreement of January, 1877. Each party appointed an arbitrator, and as the arbitrators were unable to agree they on the 6th of February, 1880, appointed an umpire. On the 6th of March, 1880, the umpire made his award, declaring that the *Pelican Bottling Company* (consisting of *Walter Kitchin* and *A. de Martelly*) had broken the agreement of the 22nd of January, 1877, and had failed to take the quantity of wine they contracted by it to take, and he awarded that £1250 was due to Messrs. *Cantor* from the *Pelican Bottling Company* as damages for such breach of agreement. On the 21st of April, 1880, the agreement of the 22nd of January,

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(1) 24 Wendell, 35.

1877, and the appointments of the arbitrators and umpire were made a rule of the Common Pleas Division. Judgment was signed against *Martelly & Co.* on this award, but the judgment was not satisfied. *Joseph Kitchin* had on the 3rd of July, 1879, filed a liquidation petition. Messrs. *Cantor* claimed to prove in the liquidation upon *Joseph Kitchin's* guarantee for £1250, the amount of the award. The Registrar admitted the proof for the whole amount. The trustee in the liquidation appealed.

Winslow, Q.C., and *Arthur Powell*, for the Appellant:—

The Court of Bankruptcy is not bound by a judgment, but can inquire into the consideration for it: *Ex parte Banner* (1); and this principle applies equally to the award of an arbitrator.

[Lush, L.J.:—Is a surety bound by a judgment against the principal debtor? Would the award be conclusive in an action against *Kitchin* on his guarantee?

James, L.J.:—The guarantee is on behalf of the new firm. In what way have they agreed to submit to arbitration?]

There was no novation of the old agreement between Messrs. *Cantor* and the new firm, and no submission by *Kitchin* to an arbitration with regard to his liability on his guarantee. But whether there was or was not a novation, the trustee in the liquidation is not bound by the award. The bankruptcy does not of itself revoke a submission to arbitration, yet the assignees are not bound by it unless they adopt it: *Russell* on Arbitration (2); *Robson* v. ——— (3); *Marsh* v. *Wood* (4); *Dod* v. *Herring* (5). The judgment in an action against a principal debtor is not binding on the surety, unless he is made a party to the action; it is *res inter alios acta*. There is no English decision precisely in point as to this, but it has been expressly so held in the Courts of the *United States: Douglass* v. *Howland* (6). And the surety cannot be brought in by a third party notice under the *Judicature Act*, for the principal has no right of indemnity against him.

[James, L.J.:—The surety can call in the principal, but the principal cannot call in the surety.]

(1) *Ante*, p. 480.
(2) 5th Ed. pp. 32, 156.
(3) 2 Rose, 50.
(4) 9 B. & C. 659.
(5) 3 Sim. 143; 1 Russ. & My. 153.
(6) 24 Wendell, 35.

De Gex, Q.C., and *J. E. Linklater*, for Messrs. *Cantor*:—

The letter of guarantee amounts in effect to an agreement that the submission to arbitration shall be binding on the guarantor. Both parties have acted on it; the wine has been supplied, and there has been a complete novation. An award differs from a judgment in this respect, that there cannot be a new trial. Why should not the award be conclusive as it was intended to be?

[JAMES, L.J.:—Can there be a verbal submission to arbitration?]

There is no reason why there should not. In mercantile contracts words may be implied: *Shepherd* v. *Harrison* (1).

JAMES, L.J.:—

The real question is, what is the true intent and meaning of the guarantee? It must be treated, as Lord Justice *Lush* has already said, as if Mr. *Kitchin*, the guarantor, had been an entire stranger. The fact that he had been a partner in the English firm, or the motives which induced him to give the guarantee, cannot have the slightest effect on its true legal operation. The continuing partners are to pay for the wines supplied, but he will pay for the wines if they do not, or will make good what they do not pay. There are a great number of things which by the agreement they are bound to do; he guarantees that they will do these things, and if they fail to do them, then he is liable in an action against him by Messrs. *Cantor* for any damages which can be shewn by legal evidence to have been caused to them by that default. That is what he has agreed. It is contended that he is liable to pay any sum which an arbitrator shall say is the amount of the damages. The guarantee must be expressed in very clear words indeed before I could assent to a construction which might lead to the grossest injustice. It is perfectly clear that in an action against a surety the amount of the damage cannot be proved by any admissions of the principal. No act of the principal can enlarge the guarantee, and no admission or acknowledgment by him can fix the surety with an amount other than that which was really due and which alone the surety was liable

(1) Law Rep. 5 H. L. 116, 133.

to pay. If a surety chooses to make himself liable to pay what any person may say is the loss which the creditor has sustained, of course he can do so, and if he has entered into such a contract he must abide by it. But it would be a strong thing to say that he has done so, unless you find that he has said so in so many words. The arbitration is a proceeding to which he is no party; it is a proceeding between the creditor and the person who is alleged to have broken his contract, and if the surety is bound by it, any letter which the principal debtor had written, any expression he had used, or any step he had taken in the arbitration would be binding upon the surety. The principal debtor might entirely neglect to defend the surety properly in the arbitration; he might make admissions of various things which would be binding as against him, but which would not, in the absence of agreement, be binding as against the surety. It would be monstrous that a man who is not bound by any admission of the principal debtor, should be bound by an agreement between the creditor and the principal debtor as to the mode in which the liability should be ascertained. That is enough to dispose of the case. But, besides that, the arbitration was a mutual clause between the old English firm and the suppliers of the wine, Messrs. *Cantor*, and it is of the essence of it that, if the dispute is not going to be settled in the ordinary mode by an action at law, the award shall be made a rule of Court, so as to give the Court absolute jurisdiction over it in case there should be any misconduct, or miscarriage, or error on the part of the arbitrator. Now an award can only be made a rule of Court by submission in writing, and there is no submission in writing as between Messrs. *Cantor* and the new English firm which can be made a rule of Court. The clause, therefore, is utterly inapplicable to the new state of things.

Baggallay, L.J.:—

I am of the same opinion, and I have very little to add. It appears to me that it is only necessary to state the facts in order to shew that the claim of Messrs. *Cantor* in its present form cannot be supported. [His Lordship stated the facts.] All that *Joseph Kitchin* has agreed to do is this, to guarantee the performance of the original agreement by *Martelly & Co.* If they have not performed that agreement, Mr. *Kitchin*, who has guaranteed the performance of it, must pay the damages, but the amount of those damages must be ascertained in the usual way. I can see no ground whatever for saying that the conclusion arrived at between the new firm and Messrs. *Cantor* as to the amount of the damages is to be binding upon Mr. *Kitchin*, the guarantor.

LUSH, L.J. :—

The question before us is not whether Mr. *Kitchin*, the liquidating debtor, is liable upon his guarantee, nor whether Messrs. *Cantor* are entitled to prove against his estate. The question is, for what amount they are entitled to prove, and that is the only contest between the parties. Messrs. *Cantor* claim to prove for the amount which has been awarded in an arbitration to which Mr. *Kitchin* was no party, an arbitration between themselves and the principal debtors pursuant to the terms of the agreement. Now, I agree with Mr. *Linklater* that, if the guarantee fairly bears this meaning, not only that the firm shall arbitrate if they are required to do so, but "I undertake to pay you such sum as the arbitrators shall find that they owe you for damages," a proof might well be made for that sum. But I do not think any of us ever saw a guarantee in such a form, and, to my mind, this guarantee has not, and was never intended to have, such an effect. There is not a word said in it as to what amount the surety will pay; it is not usual to say that, and there is not a word about it here. What he says is, "I undertake and guarantee that all wines supplied to them by you shall be duly paid for." Now, suppose the dispute between the parties was whether a given amount was due for wine; supposing the creditors had brought an action against the debtors, and had proved before a jury, and had got a verdict for a given amount as being the debt due to them for wines supplied, and they had then brought an action against the surety upon this guarantee, that verdict would have been no evidence against the surety of the amount due for wines. The creditors must have proved it over again against the surety, because he is not bound by any admissions or statements of the principal as to what amount is due. He is only bound to pay the amount which shall be proved against him. In such a case as that, the verdict would have been no evidence at all, except to shew what the amount of the verdict was. It would have been no evidence of the surety's liability to pay that amount. Then we go on to the next clause: "I undertake and guarantee that the agreement shall be otherwise duly performed in all respects." That is all. He does not say a word about paying anything. That is left to the proper legal conclusion. He would have to pay damages for the breach of the contract by the new firm. How are those damages to be assessed? Why, in the same way as the debt would have to be assessed if the claim were for wine supplied. You must find explicit words to make a person liable to pay any amount which may be awarded against a third person, whether it be by a jury, or a Judge, or an arbitrator. That is not the natural construction of the words of this guarantee nor the usual form; for, as I have already said, I never saw a guarantee which contained such words. What the guarantor engages for is to be answerable for any debt they may owe for wines, and for any damages which may be sustained by the breach of any other of the provisions of the agreement. Then the amount of the debt in the one case, and the amount of the damages in the other, must, if the surety insists upon it, be proved as against him, just as it would have to be proved if the action were against the principal. For these reasons I hold that the creditors are not entitled to prove for the amount found due by the award. They are entitled to prove if they can estimate the amount due; if not, the amount must be ascertained in the same way as it would be if they had brought an action against the surety.

Solicitors for Trustee: *Hindson Miller & Vernon.*
Solicitors for Creditors: *Stibbard, Gibson, & Co.*

W. L. C.

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[1880 W. 1793]

C. A.

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V.-C. B.
April 2.

C. A.
April 6.

23CLD
392-4
400-7

Practice—Production—Privileged Communications.

In an action for specific performance of a building contract to take on lease building land from the Defendants, the Defendants sought to protect from production letters which had passed between their solicitors and their surveyors :—

Held, by *Bacon*, V.C., that the letters were privileged.

Held, on appeal, that the Defendants must produce the letters, except such of them (if any) as the Defendants should state by affidavit to have been prepared confidentially after dispute had arisen between the Plaintiff and the Defendants, and for the purpose of obtaining information, evidence, or legal advice with reference to litigation existing or contemplated between the parties to the action.

THIS was an action for specific performance of an agreement under which the Defendants were to grant a lease of certain land to the Plaintiff on his erecting certain buildings, and were to make advances of money to him as the buildings proceeded. The Defendants were the trustees of the will of Mr. *Brett*, whose estate was being administered in an action of *Brett* v. *Le Marchant*. The Defendants in the present action, under the usual order for an affidavit as to documents, filed an affidavit in which they objected to produce the documents in the second part of the first schedule thereto, "on the ground that many of them consist of [instructions and briefs to counsel, with their opinions, notes, and observations and indorsements thereon, and orders and copies and drafts of orders and other documents, all in the matter of *In re Brett's Estate, Brett* v. *Le Marchant*, in which the estate of our testator, *G. A. Brett*, deceased, is being administered under the direction of the Chancery Division of the High Court of Justice, and the remainder of such documents consists of confidential correspondence between ourselves and our former solicitors and our present solicitors and our former estate-agent and surveyor, Mr. *Wilkinson*, and his agent, Mr. *N. Kempthorne*, and our present estate-agent and surveyor, Mr. *Ellis*, and between such solicitors and agents] and drafts and originals of instructions to counsel and counsel's

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opinions thereon, accounts, and other documents in this action which were prepared and written for the purpose of our defence to this action, and all of which documents are privileged from production."

The Plaintiff took a summons for the production of such of the documents comprised in the second part of the first schedule as came within the description inclosed in brackets in the above paragraph of the affidavit. This summons was adjourned into Court.

Seward Brice, for the summons:—

Letters passing between a surveyor employed by the Defendant's solicitor and the solicitor, are not protected on the ground of professional confidence: *Anderson* v. *Bank of British Columbia* (1); *Bustros* v. *White* (2); *M'Corquodale* v. *Bell* (3).

To inspection of the documents in the other action relating to our estate we are clearly entitled.

Marten, Q.C., and *Hadley*, *contrà*:—

It is perfectly settled that communications between a solicitor and his client are privileged. It was only after some litigation that the protection was extended to communications between solicitors and their agents or surveyors; but that is now also established: *Herring* v. *Clobery* (4); *Pearse* v. *Pearse* (5); *Manser* v. *Dix* (6); *Lawrence* v. *Campbell* (7); *Wilson* v. *Northampton and Banbury Junction Railway Company* (8); *Macfarlan* v. *Rolt* (9); *Minet* v. *Morgan* (10); *Steele* v. *Stewart* (11); *Lafone* v. *Falkland Islands Company* (12); *Walsham* v. *Stainton* (13); *Nicholl* v. *Jones* (14); *Cossey* v. *London, Brighton, and South Coast Railway Company* (15); *Skinner* v. *Great Northern Railway Company* (16);

(1) 2 Ch. D. 644.
(2) 1 Q. B. D. 423.
(3) 1 C. P. D. 471.
(4) 1 Ph. 91.
(5) 1 De G. & Sm. 12, 25.
(6) 1 K. & J. 451, 453. 1 Jur. N.S. 464
(7) 4 Drew. 485. 5 Jur. N.S. 1071
(8) Law Rep. 14 Eq. 477.
(9) Law Rep. 14 Eq. 580.
(10) Ibid. 8 Ch. 361.
(11) 1 Ph. 471.
(12) 4 K. & J. 34.
(13) 2 H. & M. 1.
(14) Ibid. 588.
(15) Law Rep. 5 C. P. 146.
(16) Ibid. 9 Ex. 298.

Friend v. *London, Chatham, and Dover Railway Company* (1); *Southwark and Vauxhall Water Company* v. *Quick* (2); *Turton* v. *Barber* (3).

As to the second point, *Brett* v. *Le Marchant* has nothing to do with this action, and the Plaintiff has no right to inquire into it: *Bullock* v. *Corry* (4).

Seward Brice, in reply.

BACON, V.C.:—

This subject is always a difficult one. On the one hand, I have to consider the right of the Plaintiff to discovery, and on the other hand, to consider what are the rights of the Defendants to protect themselves against disclosing anything that has taken place in the course of confidential communications.

The Defendants, having stated in their affidavit that they have in their possession documents relating to the matters in question in the action, go on to say, that they desire to protect themselves against discovery or production, and they state it in this way:—[His Lordship read the passage from the affidavit, and continued:—] There are two sets of things. I take first the papers in the administration suit of *Brett's* estate. Now what reason can there be why the Plaintiff should ask to see these? No reason has been suggested. What right can a plaintiff have to say to a defendant, "You are engaged in a litigation with somebody else, and you ought to produce the papers in that action." The only relation the papers can have to this action is that *Brett's* estate is the subject-matter of that action, and therefore they may be said to have some relation to this action. But what right can the Plaintiff have to look into the papers in *Brett's* administration suit? There has been no case referred to and no reason suggested why the Plaintiff, in this suit for specific performance of an agreement as to a piece of land taken for the purpose of building, should ransack the proceedings in the administration suit of *Brett's* estate. That is wholly and entirely unreasonable.

The other ground of exemption is that the documents are con-

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(1) 2 Ex. D. 437.

(2) 3 Q. B. D. 315.

(3) Law Rep. 17 Eq. 329.

(4) 3 Q. B. D. 356.

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fidential communications. This contention has given rise to a very long discussion. A great many authorities have been referred to, but the principle is perfectly distinct and plain. A man is not to be so impeded in his business transactions, whether he is, or is likely to be, engaged in litigation or not, as to prevent him from employing a solicitor, for the purpose, first, of obtaining his advice, and next of collecting evidence; or from employing any agent, not being a solicitor, who is engaged for the like purpose; and if the Defendant takes upon himself to say that these were all confidential communications, what right have I to say that his confidential communications should be disclosed? The case of *Anderson* v. *Bank of British Columbia* (1) is totally different and distinct. The manager of one branch of a bank writes to the manager of another branch, and says, "Send me the full particulars of so and so" (being a transfer of money from one branch to the other). That is an act done by which the rights of parties may be affected. With regard to cases of reports made by medical officers, it was held that they were protected from discovery because they were made with respect to litigation actually going on. There is no doubt about the law. The general principles laid down by Lord *Lyndhurst* in *Herring* v. *Clobery* (2), in my opinion, govern and cover the whole ground of the right to production. I should have hesitated more than I do if I had heard any suggestion why the Defendants should be compelled to produce communications which took place during the dispute between the parties, shewing the advice or assistance which the Defendants procured from their solicitors or their surveyors—surveyors being necessarily employed in a matter of this kind. Why are these gentlemen, who are so unfortunate as to be made Defendants, to be compelled to disclose all that has taken place between them and the persons employed by them? There is no reason for it. In my opinion the affidavit might have been more distinct than it is; but that concerns those who if they were not satisfied with the affidavit as it stands should have insisted on another and better and more distinct statement. In my opinion, the Plaintiff has no right to look into the proceedings in the administration suit, or into the letters which are said to

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(1) 2 Ch. D. 644.

(2) 1 Ph. 91.

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be confidential communications and therefore privileged. The opinions of counsel, instructions, drafts, and so forth, are of course protected against discovery. In my opinion there is no ground for seeking to trespass on the privilege which the Defendants claim, and I must therefore refuse this summons with costs.

C. A.

The Plaintiff appealed. The appeal was heard on the 6th of April.

Davey, Q.C., and *Seward Brice* for the Appellant:—

We object to the order so far as it protects communications which passed between the surveyors of the Defendants and the solicitors of the Defendants before any dispute had arisen, and there is no authority for holding such communications privileged. The rule is laid down in *M'Corquodale* v. *Bell* (1).

[JESSEL, M.R., referred to *Lafone* v. *Falkland Islands Company* (2).]

Marten, Q.C., and *Hadley*, for the Defendants:—

We contend that all communications between the solicitors and the representatives of the client ought to be held privileged. The surveyor is a person whom the solicitor must consult to enable him to advise his client properly, and all communications with persons whom he consults confidentially for the purpose of enabling him to advise his client are within the principle of the rule as to protection. Communications between the solicitor and client are privileged, whether litigation is commenced or contemplated or not: *Herring* v. *Clobery* (3); and the same rule ought to apply to communications between the solicitor and agents of the client: *Lawrence* v. *Campbell* (4).

[BRETT, L.J.:—Scotch legal advisers stand on the same footing as English legal advisers.]

In *Macfarlan* v. *Rolt* (5), communications between the agents of the Defendants and their solicitors *ante litem motam* were held

(1) 1 C. P. D. 471.
(2) 4 K. & J. 34.
(3) 1 Ph. 91.
(4) 4 Drew. 485. 5 Jur. N.S. 1071
(5) Law Rep. 14 Eq. 580.

privileged. *Wilson* v. *Northampton and Banbury Junction Railway Company* (1) nearly decides the present point, and *Walsham* v. *Stainton* (2) is very similar to it.

[COTTON, L.J.:—Your proposition is that all communications by a solicitor with third parties, for the purpose of enabling him to give advice, are privileged. Has any case protected them except when made *post litem motam?*]

The cases as to medical referees do: *Cossey* v. *London, Brighton, and South Coast Railway Company* (3); *Friend* v. *London, Chatham, and Dover Railway Company* (4). The protection of all communications between the solicitor and client was not settled till *Minet* v. *Morgan* (5), the rule having been made uncertain by *Lord Walsingham* v. *Goodricke* (6). The question is whether the rule, though not distinctly carried to such a length by any of the cases, ought not to be extended to meet this case; and in *Macfarlan* v. *Rolt* (7) Vice-Chancellor *Wickens* expresses his opinion that the rule in *Manser* v. *Dix* (8) ought to be extended. *Mostyn* v. *West Mostyn Coal and Iron Company* (9) bears strongly in our favour.

[*Southwark and Vauxhall Water Company* v. *Quick* (10), *Hooper* v. *Gumm* (11), *Ross* v. *Gibbs* (12), and *Turton* v. *Barber* (13), were also referred to.]

JESSEL, M.R.:—

As regards the main question in dispute, this appears to be an attempt on the part of the present Respondents to extend the rule as to protection from discovery. It was fairly admitted by their counsel that no decided case carries the rule to the extent to which they wish it carried, but they urged that as a matter of principle it ought to be so extended. What they contended for was that documents communicated to the solicitors of the Defendants by third parties, though not communicated by such third parties as agents of the clients seeking advice, should be protected, because those documents contained information required or asked for by the solicitors, for the purpose of enabling them the better to advise the clients. The cases, no doubt, establish that such documents are protected where they have come into existence after litigation commenced or in contemplation, and when they have been made with a view to such litigation, either for the purpose of obtaining advice as to such litigation, or of obtaining evidence to be used in such litigation, or of obtaining information which might lead to the obtaining of such evidence, but it has never hitherto been decided that documents are protected merely because they are produced by a third person in answer to an inquiry made by the solicitor. It does not appear to me to be necessary, either as a result of the principle which regulates this privilege or for the convenience of mankind, so to extend the rule. In the first place, the principle protecting confidential communications is of a very limited character. It does not protect all confidential communications which a man must necessarily make in order to obtain advice, even when needed for the protection of his life, or of his honour, or of his fortune. There are many communications which, though absolutely necessary because without them the ordinary business of life cannot be carried on, still are not privileged. The communications made to a medical man whose advice is sought by a patient with respect to the probable origin of the disease as to which he is consulted, and which must necessarily be made in order to enable the medical man to advise or to prescribe for the patient, are not protected. Communications made to a priest in the confessional on matters perhaps considered by the penitent to be more important even than his life or his fortune, are not protected. Communications made to a friend with respect to matters of the most delicate nature, on which advice is sought with respect to a man's honour or reputation, are not protected. Therefore it must not be supposed that there is any principle which says that every confidential communication which it is necessary to make in order to carry on the ordinary business of life is protected. The protection is of a very limited character, and in this country is

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(1) Law Rep. 14 Eq. 477.
(2) 2 H. & M. 1.
(3) Law Rep. 5 C. P. 146.
(4) 2 Ex. D. 437.
(5) Law Rep. 8 Ch. 361.
(6) 3 Hare, 122.
(7) Law Rep. 14 Eq. 580.
(8) 1 K. & J. 451.
(9) 34 L. T. (N.S.) 531.
(10) 3 Q. B. D. 315.
(11) 2 J. & H. 602.
(12) Law Rep. 8 Eq. 522.
(13) Law Rep. 17 Eq. 329.

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restricted to the obtaining the assistance of lawyers, as regards the conduct of litigation or the rights to property. It has never gone beyond the obtaining legal advice and assistance, and all things reasonably necessary in the shape of communication to the legal advisers are protected from production or discovery in order that that legal advice may be obtained safely and sufficiently.

Now, keeping that in view, what has been done is this: The actual communication to the solicitor by the client is of course protected, and it is equally protected whether it is made by the client in person or is made by an agent on behalf of the client, and whether it is made to the solicitor in person or to a clerk or subordinate of the solicitor who acts in his place and under his 23ChD400 direction. Again, the evidence obtained by the solicitor, or by his direction, or at his instance, even if obtained by the client, is protected if obtained after litigation has been commenced or threatened, or with a view to the defence or prosecution of such litigation. So, again, a communication with a solicitor for the purpose of obtaining legal advice is protected though it relates to a dealing which is not the subject of litigation, provided it be a communication made to the solicitor in that character and for that purpose. But what we are asked to protect here is this. The solicitor, being consulted in a matter as to which no dispute has arisen, thinks he would like to know some further facts before giving his advice, and applies to a surveyor to tell him what the state of a given property is, and it is said that the information given ought to be protected because it is desired or required by the solicitor in order to enable him the better to give legal advice. It appears to me that to give such protection would not only extend the rule beyond what has been previously laid down, but beyond what necessity warrants. The idea that documents like these require protection has been started, if I may say so, for the first time to-day, and I think the best proof that the necessities of mankind have not been supposed to require this protection is that it has never heretofore been asked. It seems to me we ought not to carry the rule any further than it has been carried. It is a rule established and maintained solely for the purpose of enabling a man to obtain legal advice with safety. That rule does not, in my opinion, require to be carried further, and there fore I think this appeal ought to be allowed, and an order made in the terms which will be read by Lord Justice *Cotton.*

Brett, L.J.:—

The proposition laid before us for approval is, that where one of the parties to an action has in his possession or control documents which passed between his solicitor and third parties, they are protected in his hands from inspection, on the ground that they were documents which passed between the solicitor and the third party for the purpose of enabling the solicitor to give legal advice to his client, although such information was obtained by the solicitor for that purpose at a time when there was no litigation pending between the parties, nor any litigation contemplated. It seems to me that that proposition cannot be acceded to. It is beyond any rule which has ever been laid down by the Court, and it seems to me that it is beyond the principles of the rules which have been laid down. The rule as to the non-production of communications between solicitor and client is a rule which has been established upon grounds of general or public policy. It is confined entirely to communications which take place for the purpose of obtaining legal advice from professional persons. It is so confined in terms, it seems to me it is so confined in principle, and it does not extend to the suggested case.

It was said, however, that there were two cases which supported, although they were not absolute decisions in favour of the proposition. One was the case of *Mostyn* v. *West Mostyn Coal and Iron Company* (1), which when looked at gives no support at all to the present contention. The other case was *Wilson* v. *Northampton and Banbury Junction Railway Company* (2). I think that probably some documents were shut out from production in that case which were of such a character that if the decision really intended to shut them out it might give colour to the proposition now contended for. But if that is so, then, with deference, I think that decision was wrong. There is no authority and there is no principle which obliges us to extend the doctrine to the extent now contended for.

(1) 34 L. T. (N.S.) 531.

(2) Law Rep. 14 Eq. 477.

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COTTON, L.J.:—

The only contest here is whether the Plaintiff can compel the Defendants to produce certain communications which took place between the solicitor of the Defendants and their surveyor and between the surveyor and the solicitor. I feel a little difficulty in dealing with the matter, because we do not know precisely in what way the Defendants intend to put their claim for protection. We have not an affidavit by them stating the exact circumstances under which these communications passed, or on what ground they seek to protect them. Their case is put, as I understand it, in this way: It is said that as communications between a client and his legal advisers for the purpose of obtaining legal advice are privileged, therefore any communication between the representatives of the client and the solicitor must be also privileged. That is a fallacious use of the word "representatives." If the representative is a person employed as an agent on the part of the client to obtain the legal advice of the solicitor, of course he stands in exactly the same position as the client as regards protection, and his communications with the solicitor stand in the same position as the communications of his principal with the solicitor. But these persons were not representatives in that sense. They were representatives in this sense, that they were employed on behalf of the clients, the Defendants, to do certain work, but that work was not the communicating with the solicitor to obtain legal advice. So their communications cannot be protected on the ground that they are communications between the client by his representatives and the solicitor. In fact, the contention of the Respondents comes to this, that all communications between a solicitor and a third person in the course of his advising his client are to be protected. It was conceded there was no case that went that length, and the question is whether, in order fully to develop the principle with all its reasonable consequences, we ought to protect such documents. Hitherto such communications have only been protected when they have been in contemplation of some litigation, or for the purpose of giving advice or obtaining evidence with reference to it. And that is reasonable, because then the solicitor is preparing for the defence or for

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bringing the action, and all communications he makes for that purpose, and the communications made to him for the purpose of giving him the information, are, in fact, the brief in the action, and ought to be protected. But here we are asked to extend the principle to a very different class of cases, and it is not necessary, in order to enable persons freely to communicate with their solicitors and obtain their legal advice, that any privilege should be extended to communications such as these. In my opinion the Plaintiff is entitled to have an order for production of the documents as to which the contest has arisen, except such, if any, as the Defendants shall state by affidavit to have been prepared confidentially after dispute had arisen between the Plaintiff and Defendants and for the purpose of obtaining information, evidence, or legal advice with reference to litigation existing or contemplated between the parties to this action.

Solicitors for Plaintiff: *Boxall & Boxall.*
Solicitors for Defendants: *Gregory, Rowcliffes, & Co.*

H. C. J.

ATTORNEY-GENERAL *v.* BIRMINGHAM, TAME, AND REA DRAINAGE BOARD.

[1881 A. 221.]

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V.-C. B.
April 26.
C. A.
May 18.

Action in nature of Supplemental Suit—Action to enforce Judgment against Successors in Title—Nuisance—Injunction—District Board—38 & 39 *Vict.* c. 55, s. 275.

A decree was made in 1875 against the corporation of *B.*, as the sanitary authority of *B.*, granting a perpetual injunction to restrain them from allowing sewage to flow into a river so as to be injurious to health or a nuisance to the Plaintiffs; but the injunction was suspended for five years, to give the corporation an opportunity to execute certain works. After the expiration of that period the Plaintiffs desired to enforce the injunction, but in the meantime the *B.*, *T.*, and *R.* District Board had been constituted under the *Public Health Act*, 1875 (38 & 39 Vict. c. 55), as the sanitary authority of the district, in the place of the corporation of *B.*

The Plaintiffs brought an action against the *B.*, *T.*, and *R.* Board, claiming a declaration that they were entitled to the same benefit of the decree as against the Defendants in the present action as if they had been Defendants in the former suit. The Defendants demurred:—

Held (reversing the decision of *Bacon*, V.C.), that the *B.*, *T.*, and *R.*

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20 Ch D 600
21 Ch D 189
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Board were not made by the *Public Health Act* subject to any liabilities of their predecessors except those attaching under the Act, and were, therefore, not bound by the decree against them; and that, there being no allegation of any nuisance committed by the *B.*, *T.*, and *R.* Board, the Plaintiffs had no cause of action, and the demurrer must be allowed.

DEMURRER.

This was an information and action by Lord *Norton*, as relator, and Lord *Norton* and his eldest son, as Plaintiffs, against the *Birmingham*, *Tame*, and *Rea* District Drainage Board.

The statement of claim contained the following allegation:—

On the 8th of July, 1858, the present relator and Plaintiffs filed an information and bill in Chancery against the council of the borough of *Birmingham*, asking for an injunction restraining them from causing and permitting the main sewer of the town of *Birmingham* from discharging itself into the river *Tame* so as to become a nuisance and injurious to the public health, and for damages to the Plaintiffs for the wrongful acts of the Defendants.

By the decree at the hearing of the suit by Vice-Chancellor *Bacon* it was ordered that a perpetual injunction should be awarded to restrain the council, their servants, &c., from causing or permitting the main sewers, or any additional sewers which might thereafter be constructed by them, to be discharged, or the sewage of the said borough in any manner to drain, into the river *Tame*, so as to create or continue the nuisance complained of by the information and bill, that is to say, such a pollution of the river *Tame* as to render it injurious to the health of the inhabitants of the houses adjoining its course, or such pollution thereof as might make it offensive and unfit for use and injurious to health where it passed through the grounds of the Plaintiffs; and the said council undertaking to carry on, and with all diligence complete, the works then being constructed for the purification of the sewage of the said borough; and the relator and Plaintiffs undertaking not to take any proceedings for five years by reason of any breach of the injunction other than such proceedings as might be necessary for compelling the due performance by the council of the said undertaking, and the council undertaking that such postponement on the part of the relator and Plaintiffs should be without prejudice to any such proceedings as might be taken by them after the expiration of the said period of five years, it was ordered that the council should pay to the Plaintiff, Lord *Norton*, £6000 in satisfaction of all damages for all previous acts of the council; but the decree was to be without prejudice to the rights of the relator and Plaintiffs, or either of them, to take at or after the expiration of five years any such proceedings against the council as they, or either of them, might be advised for recovery of damages or otherwise in respect of any breach committed by the council of the above injunction after the date of the decree; with liberty to apply.

On the 11th of August, 1875, the *Public Health Act*, 1875, was passed, which contained provisions enabling the Local Government Board, by a provisional order, to alter areas and unite districts.

On the 5th of June, 1877, a provisional order was made under the 279th section of this Act, by which the borough of *Birmingham* and some other districts were formed into a united district, to be called the *Birmingham, Tame, and Rea Main Sewerage District*, which order was to come into operation on the 29th of September, 1877. This order was confirmed by the Act 40 & 41 Vict. c. 229.

The new board took over or purchased, under the powers of the said order, the outfall and intercepting works constructed by the council, and the sewage of the town of *Birmingham* continued to pass through them into the river *Tame*. The period of five years elapsed on the 17th of April, 1880.

There was no allegation in the statement of claim that the new board had themselves committed any nuisance or breach of the injunction,

The Plaintiffs claimed a declaration that the Plaintiffs were entitled, as against the Defendants in the present action, to have the same benefit of the decree in the former suit, except as to the damages and costs ordered to be paid, as if the same decree had been made as well against the Defendants as against the Town Council of *Birmingham*.

The Defendants demurred to the statement of claim, on the ground that it shewed no cause of action against them; and, as special ground for demurrer, that no cause of action had arisen within six months.

C. A.
1881

ATTORNEY-GENERAL v. BIRMINGHAM, TAME, AND REA DRAINAGE BOARD.

The demurrer came on for hearing before Vice-Chancellor *Bacon* on the 26th of April, 1881.

Horton Smith, Q.C., and *Cozens-Hardy*, in support of the demurrer.

Davey, Q.C., *Rodwell*, Q.C., and *Carson*, for the Plaintiffs, referred to *Attorney-General* v. *Corporation of Birmingham* (1).

BACON, V.C.:—

I will not trouble you, Mr. *Davey*. I am of opinion that this is not a case in which a demurrer can be sustained. Sir *Charles Adderley* for many years has been in litigation with the *Birmingham* Town Council, very inconvenient neighbours, for a nuisance which he claimed to have redressed. Up to a certain point he succeeded, but not without very great difficulty and great delay. At last came that decree in which the question between the parties was in some degree disposed of, which gave five years to the Town Council to complete the works, which they said would obviate any cause of complaint on the part of Sir *Charles Adderley*. There the matter stood until this change of personages took place and the present Defendants were put in the place of the Town Council, subject to all the obligations of the Town Council, bound by every decree that has been made in the cause; and the object of this suit is simply that, now that the Town Council have slipped themselves out of it by the proceedings that were taken under the *Public Health Act*, the Plaintiffs in the suit shall have the same right against the substituted bodies as they would have under the decree against the original body.

The 15th paragraph of the claim states that in the most distinct terms "the elective members of the *Birmingham*, *Tame*, and *Rea* District Drainage Board were duly elected shortly after the date of the last-mentioned Act, and immediately thereupon the said District Drainage Board took over or purchased under the powers of the said order of the 5th of June, 1877, the outfall and intercepting works belonging to the said council, and have since maintained the same under the like powers, and have also constructed further works in connection with such outfall and intercepting works, or some of them, and through the works so taken over or purchased or constructed the sewage of the said borough of *Birmingham* has since the time of such taking over, purchase, or construction, drained or passed into the said river *Tame*."

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(1) 15 Ch. D. 423.

That is admitted by the demurrer; it is, I suppose, incapable of contradiction. Then the claim the Plaintiffs make is a declaration that the decree of April, 1865, is binding between the Plaintiffs on the one hand and the Defendants on the other, except as to the £6000 which has been paid, and "that, subject as aforesaid, the Plaintiffs are entitled as against the Defendants in the present action to have the same benefit of the said decree as if such decree had been made as well against the Defendants in the present action as against the said council."

In my opinion, the statement I have read being admitted by the demurrer and the claim being that which I have read from the statement of claim, the Plaintiffs are perfectly justified if they had not the sanction of the Court of Appeal; but that case has been referred to, and it shews that they are quite entitled to maintain this action. I can see no ground for such a demurrer. The point as to the six months is not capable of being put as a ground of demurrer. It may be imported at some further stage. I cannot say whether that will be so or not, I have nothing to do with it at present. I overrule this demurrer with costs.

C. A.

From this judgment the Defendants appealed. The appeal was heard on the 18th of May, 1881.

Sir *F. Herschell*, S.G., and *Horton Smith*, Q.C. (*Cozens-Hardy* with them), for the Appellants:—

This action is entirely misconceived. The Defendants are a distinct new corporation, and are not, strictly speaking, the successors of the Town Council. They cannot be responsible for the acts of the old corporation. They have themselves committed no wrong. The Vice-Chancellor relied upon an expression in the judgment of the Master of the Rolls in *Attorney-General* v. *Corporation of Birmingham* (1), where the Master of the Rolls says, "If it becomes necessary to enforce that judgment against persons who have acquired a title after it is made, an action must be brought for that purpose." But his Lordship did not say that could be done without fresh wrong being committed. If a man blocks up the Plaintiff's ancient lights and then sells his house, or if a gas company commits a nuisance by their gasworks and then sell the works to another company, an injunction which has been obtained against the former owner does not run with the land. Then it is said that the 275th section of the *Public Health Act*, 1875 (1), under which the Defendant corporation are constituted, rendered them liable to all the obligations of the Town Council. But this is not the correct interpretation of that section; the Legislature meant the obligations and liabilities constituted by the Act to pass to the new district authority, but did not mean to make it responsible for the wrongs committed by its predecessors, or bound by all orders previously made upon them.

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(1) 15 Ch. D. 423, 425.

With respect to the special case of demurrer, it depends on the 264th section of the Act of 1875, which enacts that "Every action against a local authority in respect of anything done under the provisions of the Act, shall be commenced within six months next after the accruing of the cause of action." Here the Plaintiffs have alleged no cause of action within six months.

Davey, Q.C., *Rodwell*, Q.C., and *Carson*, for the Plaintiffs:—

The analogy of a nuisance committed or an easement infringed by a landowner, who afterwards sells his land, does not apply to this case; because the Defendants derive their title under an Act of Parliament which expressly makes them subject to the obligations and liabilities of their predecessors. One of those liabilities was

(1) The 275th section of the *Public Health Act*, 1875 (38 & 39 Vict. c. 55), enacts as follows:—

"Every order made by the Local Government Board under this part of this Act shall specify a day on which such order shall come into operation (in this Act referred to as the commencement of the order), and from and after the commencement of the order all the powers, rights, duties, capacities, liabilities, obligations, and property which under this Act are exerciseable by or attaching to or vested in the local authority having under this Act jurisdiction in any district or part of a district which is by such order included in some other district, shall (so far as the same relate to the district or part of a district so included) pass to and vest in the local authority of such other district."

that they were restrained by the injunction of this Court from committing a nuisance in a particular way, namely, by pouring their sewage into the river *Tame*. Then the outfall works by which the sewage is poured into the *Tame* have been transferred to the Defendants, and therefore they are liable to the same obligation not to commit a nuisance in that way. There is no necessity for us to allege that they have themselves committed a breach of the injunction; we are not asking for a sequestration, but only that they may be bound by the same injunction as the Town Council.

[JESSEL, M.R.:—Under the old practice a supplemental bill, or an original bill in the nature of a supplemental bill, always alleged a fresh injury or the continuance of the old one.]

The new facts were alleged in order to bring in the new Defendants: but here the present Defendants are the successors of the old ones, and are so constituted by the Act. It is unreasonable that we should be obliged to begin all over again in consequence of the statutory transfer of the powers of the Town Council.

JESSEL, M.R.:—

With great respect to the Vice-Chancellor, I think this action cannot be maintained. In the first place, it is clearly an action of first impression: nobody ever heard of such a thing before; there is nothing like it as far as I am aware in the old practice in the Court of Chancery.

The action was originally an action against the Town Council of *Birmingham*, who were the local sanitary authority, to prevent their committing a nuisance, which was both a public and a private nuisance—a public nuisance which occasioned the intervention of the Attorney-General, and a private nuisance to Lord *Norton* in respect of his estate. In that action a perpetual injunction was granted, which restrained the council, their servants, workmen, and agents, from causing or permitting certain sewers then made or certain additional sewers to be discharged or the sewage of the borough to pass into the river *Tame*, so as to create or continue the nuisance therein described, which was a nuisance making it injurious to the health of certain of the inhabitants. It then appears that after the date of that order, under the provisions of the *Public Health Act* of 1875, a new district was formed, including a large area near to the borough of *Birmingham* as well as the borough. That new district had of course a joint board, which governed and which was the sanitary authority of that new district. That new board took over or purchased the outfall and intercepting works, which formerly belonged to the *Birmingham* Town Council, and it has constructed some further works, but it is not alleged that since the date of the appointment of the new district any nuisance has been committed or allowed by the Defendants, the new sanitary authority. Under those circumstances, the present action seeks a declaration, and nothing more, that the new body—the new sanitary authority—is bound by the old decree, except as to certain damages and costs which have been paid, and which is now, therefore, an injunction, although there is liberty to apply as to further damages.

The first observation to be made is that this is an injunction to restrain the continuance of a tort. It is an injunction merely against the council, their workmen, and agents, and cannot be said to run with the land. If they have sold the property to somebody else, there is no injunction against the new owner, and nobody ever heard in such a case of the new owner or purchaser of land being liable to the former decree. If he continues the nuisance or commits a fresh nuisance, you can bring an action against him, and that is all; he has nothing to do with the former proceedings, and I cannot see any ground whatever for supposing that he can be bound by that decree: nor, I believe, was such a thing ever heard of before.

That being so, what is the case made by the present Respondents? It is said, although the action would not lie in an ordinary case, yet as this is a public body which has taken over a portion of the property of the former public body, and to a certain extent succeeded to it, this new body is bound by Act of Parliament by the former decree. Of course an Act of Parliament can do a great many things, and it can certainly make the new body bound by the old decree. Therefore the only question remaining to be examined is, has it done so? Now for that purpose we were referred to the 275th section of the *Public Health Act*, 1875, which says, "from and after the commencement of the order, all the powers, rights, duties, capacities, liabilities, obligations, and property which under this Act are exerciseable by or attaching to or vested in the local authority having under this Act jurisdiction in any district or part of a district which is by such order included in some other district, shall so far as the same relate to a district or part of a district so included pass to and vest in the local authority of such other district." Here the obligations are limited to those obligations attaching under this Act. I need not say the obligation of this decree is not attaching under this Act, or mentioned in this Act, nor has it anything to do with the Act. The result is that there is no Act of Parliament which makes this decree binding on the new body, and that argument appears to me to be entirely unsustainable.

There being no other ground suggested, and no other, I imagine, can be suggested, it appears to me that this demurrer ought not to have been overruled, and that this appeal should be allowed.

James, L.J.:—

I agree with the Master of the Rolls, for to my mind the action is entirely a novel one. I have never seen such a declaratory action before. It is either wrong or it is unnecessary. The object of it is this—the Plaintiffs say, "We want to have the benefit of a summary proceeding. We do not say you have committed a nuisance or are going to commit one, but if you commit a nuisance hereafter which would have been the subject of sequestration against the corporation of *Birmingham* upon a summary application, we want now to see if we can take the same summary proceeding against you."

Well, if they are liable they are liable, and you do not want an action. If they are liable you should have applied for a sequestration. The declaration of liability makes no difference. It appears to me to be quite clear that they are not liable, because there is no liability under that decree which in any way attaches to the present Defendants.

Lush, L.J.:—

I am of opinion that the statement of claim is defective in two essential particulars, either of which would be fatal.

In the first place, it does not shew any facts which would amount to a breach of the injunction, even supposing the Defendants were liable. The injunction was an injunction "to restrain the Council of the borough of *Birmingham* from permitting the main sewers to be constructed by them from discharging the sewage or allowing it to drain or pass into the River *Tame* so as to create or continue the nuisance complained of by the bill;" that is, so as to be a pollution of the river rendering it injurious to the health of the inhabitants of the houses adjoining its course, or such pollution as renders it offensive and unfit for use. Now the statement is simply that the new body have maintained the outfall works under the former powers, and have constructed further works in connection with the outfall and intercepting works, and, since the time of taking it over from the borough of *Birmingham*, the sewage has drained or passed into the river *Tame*. That may be perfectly true and no nuisance whatever created. There is not a word about its being suffered to pass in in such a condition as to be injurious to the health or so as to create a nuisance, and it is quite consistent with all that, that it might have been purified in such a way as not to be offensive at all, either to persons using the water or any person on the bank. If that stood alone, therefore, it would be an essential defect in the statement of claim.

Then the second ground is, that it shews no privity whatever between the Defendants and the Council, against whom the injunction was awarded. Under the Act 11 & 12 Vict. c. 63, which was the Act in force at the time, the Town Council was the sanitary body; and under the *Public Health Act*, 1875, the Act now in force under which the present Defendants were elected, by an earlier section of the Act, *Birmingham*, as one of the municipal boroughs, was itself constituted an independent urban district, and the Town Council the urban authority to execute the additional powers and duties created by that Act. If *Birmingham* had remained independent, it might have been that the Town Council would have been liable for a breach of the injunction; but then, under the 8th part of the Act, the Local Government Board have the power to dissolve any urban district and merge that in a larger area, and, in the exercise of that power, the Local Goverment Board made an

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order by which they marked out a very large area and included *Birmingham* in it, so that *Birmingham* ceased to be an independent urban district, and became only a constituent part of the larger district, and the Town Council ceased to have the authority which they had within the borough of *Birmingham*. The Defendants are the representative body elected out of the whole district.

Now the only section in the Act which has been appealed to, to shew that they take the obligations which belong to the Town Council, is the 275th section, but the meaning of that is obvious when one comes to look at the scheme of the Act. The 275th section says, in effect, that where an order has been made such as this order, namely, where what was an independent district has been merged into a larger area, all the liabilities, obligations, and property under the Act attaching to or vested in that former district, which if it had remained independent would have belonged to them, shall, as soon as the order is made, pass to (that is, all the obligations and liabilities constituted by the Act shall, as soon as the order is made, pass to) and vest in the larger body. That is all it says. As has been already observed by the Master of the Rolls, the obligation sought to be enforced here is not one created by the Act, and has nothing whatever to do with the Act, and that is all the 275th section means—that when what was an independent urban district is merged into a larger one, the power which they were to exercise, the duties and liabilities which they must have been under if they had remained, should pass over to the larger body.

Upon either of those grounds I am of opinion that the statement of claim is bad, and that the demurrer ought to have been allowed with costs.

Solicitors: *Paines, Layton, & Pollock; Sharpe, Parkers, & Co.*

M. W.

M. R.
1880
Dec. 6.

In re ROOSE.
EVANS *v.* WILLIAMSON.

[1880 E. 129.]

Will—"Farming Stock"—Growing Crops.

A testatrix, after devising all her real estate to *A.*, gave all the "farming stock, goods, chattels and effects in and about" one of her farms forming part of her real estate, to *B.*: and she gave the residue of her personal estate to other persons:—

Held, that all crops growing on the farm at the testatrix's death passed to *B.*

Vaisey v. *Reynolds* (1) disapproved of.

MARGARET ROOSE, widow, deceased, by her will, dated the 24th of July, 1879, gave all her real estate to her daughter, *Grace*, the wife of *Thomas Williamson*, during her life, for her separate use, and after her decease to her children. The testatrix then proceeded as follows: "I give unto my granddaughter, *Catherine Williams*, the sum of £1000, and all the household furniture, farming stock, goods, chattels and effects which shall be in and about *Froudeg* at the time of my decease." And the residue of her personal estate the testatrix gave to her trustees, *Thomas Evans* and *Owen Jones*—whom she also appointed executors—upon trust for sale, and to hold the proceeds upon trusts for the benefit of her said daughter, *Grace Williamson*, her husband and children.

One of the questions raised in the action—which was for the administration of the personal estate of the testatrix—was whether the crops growing upon the testatrix's freehold farm called *Froudeg* at the time of her death passed to *Grace Williamson* as the devisee of the said farm, or to *Catherine Williams* as legatee of the "farming stock."

Ince, Q.C., and *J. Maurice Lloyd*, for the Plaintiffs, the trustees and executors, submitted that the crops passed to *Catherine Williams* under the description of "farming stock": *Cox* v.

(1) 5 Russ. 12.

Godsalve (1); *West* v. *Moore* (2); *Blake* v. *Gibbs* (3); *Rudge* v. *Winnall* (4).

Russell Roberts, for *Grace Williamson* :—

The rule is that growing crops pass to the devisee of the land unless a contrary intention appears in the will, and I submit that no such contrary intention appears here. The words "farming stock in and about" a farm are not a proper description of growing crops: and it was held in *Vaisey* v. *Reynolds* (5) that growing crops did not pass under a gift of "farming stock" as against the devisee of the land, where there was no gift to the legatee of the farming stock of the whole residuary personal estate. Neither will growing crops pass under the word "chattels." Under the *Bills of Sale Act* (17 & 18 Vict. c. 36), it has been held that growing crops are not "personal chattels" within sect. 1: *Brantom* v. *Griffits* (6).

Ince, in reply.

JESSEL, M.R. :—

I am of opinion that I am bound by authority to hold that the specific legatee took the growing crops in question. This case seems almost identical with the reported cases. The words in *Cox* v. *Godsalve* were "stock of my farms," and the question was whether the corn growing passed to the Defendant *John Godsalve*, who was devisee in remainder of the land sown, or whether it passed to his mother under a bequest of "all my goods, chattels, and stock of my farms." The argument was that you could not give the corn to the devisee of the land by implication against an express bequest. The judgment of Lord *Holt* was that the gift of the corn was to the mother and not to the son; that is to say, he held that the words "stock of my farms" included growing crops.

The point came before Lord *Ellenborough*, in 1807, in *West* v. *Moore*, where he treated the law as settled. There a testator bequeathed the "stock upon my farm, and all other my personal estate of what nature or kind soever"; and it was held that that passed the growing crops as against the devisee of the land. What Lord *Ellenborough* says is this (1): "The case of *Cox* v. *Godsalve* (2) before Lord *Holt* is in terms so much the same as this, that it must conclude it: though but for that case I should have been more inclined to think that stock on the farm meant moveable stock." That shews that Lord *Ellenborough* decided upon the words "stock upon my farm" and nothing else.

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(1) 6 East, 604, n.
(2) 8 East, 339.
(3) Note to *Vaisey* v. *Reynolds*, 5 Russ. 13.
(4) 12 Beav. 357.
(5) 5 Russ. 12.
(6) 2 C. P. D. 212.

Then the point seems next to have come, in 1825, before Lord *Gifford*, Master of the Rolls, in *Blake* v. *Gibbs* (3). That was the case of a testatrix who was tenant for life only of a plantation in *Jamaica* on which the growing crops in question stood. The only question was whether the word "stock" included the growing crops. By her will the testatrix devised "all and every her negro, mulatto, and other slaves, men, women, and children, and all her cattle, mules, horses, asses, and other live and dead stock" upon the plantation. The question was, what was the meaning of the words "and other live and dead stock." It was argued on the authority of *Cox* v. *Godsalve* and *West* v. *Moore* (4) that a bequest of the stock upon a farm would include growing crops. In delivering judgment, Lord *Gifford* says this (5): "The two cases, which have been cited, prove, that the emblements are part of the stock, and will pass under the description of stock on a farm; and I cannot help thinking that the claim of the specific legatee is stronger here than in either of those cases, from the circumstance of the testatrix having been only tenant for life."

Then the point seems to have come, in 1828, before Sir *John Leach* in *Vaisey* v. *Reynolds* (6), and what he says is very odd. There the gift was of "all and every my book debts, monies in hand, stock in trade in my dwelling-house, shop, and malting; and also my farming stock of every kind and description whatsoever;" and Sir *John Leach* held that the growing crops did not pass under the gift of the farming stock, as against the devisee of the land, because there was no gift of the residuary personal estate to the legatee of the farming stock. I must say I think he was entirely wrong. No one would hold that a general bequest of personal estate would pass growing crops as against the devisee of the real estate—that under a gift of the real estate to *A.* and of the personal estate to *B.*, *A.* would not take the growing crops, yet that is the substance of Sir *John Leach's* decision. As Lord *Holt's* decision in *Cox* v. *Godsalve* (1) is reported, we cannot tell what his reasons were, but Lord *Ellenborough* says, in *West* v. *Moore* (2), that a gift of the "stock on my farm" will pass the growing crops as against the devisee of the land; and Lord *Gifford*, in *Blake* v. *Gibbs* (3), also says that the growing crops will pass under the description of stock on a farm. But Sir *John Leach* says this (4): "In the case of *Cox* v. *Godsalve*, where the words of the gift to the executor were 'stock of my farms,' there were other words in the gift which comprised all personal estate. And in *West* v. *Moore*, where the words of the gift to the executor were, 'stock upon my farm,' the whole personal estate of every nature and kind was, in terms, comprised in the gift. These cases were between the executor and the devisee of the land." That is not quite correct: in *Cox* v. *Godsalve* it is true that the mother, who was the legatee of the stock, was one of the executors, but the stock was not given to her as an executor. Then Sir *John Leach* goes on: "And the rule is, that, although crops on the ground are personal estate, and, generally speaking, pass to the executor, yet, as between the executor and the devisee, the devisee will take them with the land, unless the intention of the testator appears to be otherwise. In these two cases such intention seems to have been inferred, rather because the executor was plainly meant to take the whole personal estate, than from the mere force of the words 'stock of my farm,' or 'stock upon my farm.'" All I can say is, having read the case before Lord *Ellenborough*, I think Sir *John Leach* made a mistake. Lord *Ellenborough* says "stock upon my farm," in so many words, passes the growing crops, shewing that those were the words he relied upon. I am therefore of opinion that the distinction taken by Sir *John Leach* between

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(1) 8 East, 343.
(2) 6 East, 604, n.
(3) Note to *Vaisey* v. *Reynolds*, 5 Russ. 13.
(4) 8 East. 339.
(5) 5 Russ. 16.
(6) Ibid. 12.

(1) 6 East, 604, n.

(2) 8 East, 339.

(3) Note to *Vaisey* v. *Reynolds*, 5 Russ. 13.

(4) 5 Russ. 17.

those two cases and the case before him is quite untenable. Then the last case is *Rudge* v. *Winnall* (1), in 1849, before Lord *Langdale,* M.R. There the testator devised real estate to his trustees and executors, in trust for *A.*, and bequeathed "all his live and dead stock" and the whole of his personal estate to the same trustees and executors upon trusts for various persons. *Vaisey* v. *Reynolds* (2) was cited in the argument, and the Master of the Rolls held that the growing crops formed part of the personal estate of the testator; but I cannot find from the report whether he so decided on the ground of the gift of the whole personal estate or of the gift of "live and dead stock"; consequently that case does not help me any further than the previous cases.

In the present case the gift is in these terms: "I give unto my granddaughter *Catherine Williams* the sum of £1000 and all the household furniture, farming stock, goods, chattels and effects, which shall be in and about *Frondeg* at the time of my decease." Now, the words "farming stock" would of themselves pass the growing crops, and they would not form part of his general personal estate as against the legatee of the farming stock. The question is whether they pass to the legatee as against the devisee of the real estate. As Lord *Ellenborough* said in *West* v. *Moore* (3), the question is one of intention. What he says is this (4): "The case of *Cox* v. *Godsalve,* before Lord *Holt,* is in terms so much the same as this, that it must conclude it: though but for that case I should have been more inclined to think that stock on the farm meant moveable stock." By which he means that *Cox* v. *Godsalve* decided that stock on the farm included stock that was not moveable. Then, after saying that, as against the executors, the standing corn goes to the devisee of the land, he proceeds: "This is founded upon a presumed intention of the devisor in favour of his devisee. But this again may be rebutted by words which shew an intent that the executor shall have it." Then he notices the case before Lord *Holt,* observing that the only difference between that case and the one before him was that in the former case the legatee of the stock was not the sole executor, and that there was no material distinction between the two cases: and he winds up by saying, "and a construction having been once put upon these words, the question is now concluded." So that he says the question was concluded by the construction put upon the words "stock on the farm," that is, without reference to any other words.

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(1) 12 Beav. 357.

(2) 5 Russ. 12.

(3) 8 East, 339.

(4) Ibid. 343.

Now, in my opinion, a construction having been put upon these words, I must treat the question as concluded. I must, therefore, hold that in using the words "farming stock in and about *Frondeg*," the testator intended to include, and that they did include, the growing crops, and I so decide.

Solicitors: *Peacock & Goddard*, agents for *J. Lloyd Griffith*, *Holyhead*; *Chester, Mayhew & Co.*, agents for *J. W. Paynter*, jun., *Amlwch, Anglesey.*

G. I. F. C.

In re REES.
REES *v.* GEORGE.

[1873 R. 61.]

M. R.
1881
Jan. 29.

Will—Gift of Residue to Widow for Life, with Remainder to Children—Hotchpot—Advances—Interest.

A testator gave his residuary estate to his widow for life, with remainder to his children equally, with a proviso, in the common form, for bringing into hotchpot all sums advanced to any of them by him during his lifetime. The testator made advances to some of his children. In distributing the residuary estate among the children after the death of the widow:—

Held, that the advanced children must bring their advances into hotchpot, with interest at 4 per cent. per annum up to the distribution of the estate; such interest to be computed from the death of the widow, and not from the dates of the respective advances or from the death of the testator.

WILLIAM REES, by will dated in 1854, devised and bequeathed all his real and personal estate to trustees upon trust for sale and conversion, and to stand possessed of the proceeds, after payment of his debts, funeral and testamentary expenses, and various legacies, upon trust to invest the same, and pay the income of the investments to his wife during her life if she should continue his widow, and after her death or second marriage to pay legacies of £200 to each of his sons who should attain twenty-one; and, subject thereto, upon trust to divide all the then residue of the trust funds amongst all his children who should be living at his decease, and who, being sons, should attain twenty-one years, or, being daughters, should attain that age or marry under that age, in equal shares. And after directions as to the maintenance and advancement of children out of their presumptive shares, the testator declared that as well all and every sum and sums of money, part of the principal of the vested or presumptive or expectant share or respective shares of each or any of his said children, which should be paid, advanced, or applied by his said trustees or trustee towards the advancement in life or preferment in the world of any such his child or children as aforesaid, as also all and every sum and sums of money which the testator might pay, advance, or give to any of his said children during his life, for his or her advancement in life or preferment in the world, but not including any money paid by the testator for or towards their maintenance or education or pocket money, should in each and every instance be brought into hotchpot and accounted for as part of the share or respective shares of such child or children of and in the residue of his trust moneys and estate and effects so as aforesaid directed to be divided equally between his children, and an allowance be made for the same accordingly.

The testator died in 1860, leaving surviving him his widow and nine children, all of whom attained twenty-one. During his life the testator had made considerable advances to some of his children. The testator's widow died in 1880, whereupon the fund became divisible among the nine children, and a petition having been presented in this action—which was for the administration of the testator's estate—for payment out of Court of the nine shares, the question arose from what date the advanced children, in bringing their advances into hotchpot, were to be charged with interest on those advances.

Bevir, Q.C., for advanced children:—

I submit that we are chargeable with interest as from the death of the widow only, that is, from the time when the fund was to be divided: *Andrewes* v. *George* (1); *Poole* v. *Poole* (2).

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(1) 3 Sim. 393.

(2) Law Rep. 7 Ch. 17.

Chitty, Q.C., and *Colt*, for unadvanced children:—

We submit that interest ought to be charged on the advances as from the dates when they were made. "Hotchpot" means equality; but if one child has had the benefit of an advance, and also of the income which would have been produced by it if it had remained a part of the common fund, at an earlier date than the other children get their shares, there is no longer equality. You cannot get equality as between the legatees without charging interest on the advances. At all events, interest should be charged as from the death of the testator: *Hilton* v. *Hilton* (1); *Field* v. *Seward* (2). In *Andrewes* v. *George* (3) and *Poole* v. *Poole* (4) there was not an ordinary hotchpot clause such as we have here, but the words were very special.

[JESSEL, M.R., referred to *Ackroyd* v. *Ackroyd* (5).]

Decimus Sturges, for the assignee of an advanced child's share.

Ince, Q.C., and *Romer*, for the trustees.

JESSEL, M.R.:—

I have often had to consider the question raised by this case, but as no decision of mine on it appears to have been reported, I will again state my reasons for the view I take of it. First of all, I will say that the case with which I have to deal presents no special peculiarities, so that I shall not rely upon any particular provision in the will before me. It is, in substance, an ordinary gift of residue upon trust for the testator's wife for life with remainder to his children equally, with a proviso for their bringing into hotchpot sums which he had advanced to them during his lifetime. I am not reading the exact words of the will, because, as I said before, there is nothing special in them whatever: but what I have stated is the effect of them. The question, therefore, is, how is the property to be divided amongst the children where we find such a hotchpot clause? And what is the meaning of bringing into hotchpot? All that the testator has directed to be brought into hotchpot are the sums advanced. If we read the

(1) Law Rep. 14 Eq. 468.
(2) 5 Ch. D. 538.
(3) 3 Sim. 393.
(4) Law Rep. 7 Ch. 17.
(5) Law Rep. 18 Eq. 313.

will, we shall not find there a word about interest on the advances. In this case several of the children had received large advances in the testator's lifetime, and these are to be brought into hotchpot. How are the children to bring these advances into hotchpot? The testator has given the income to the widow, so that the children only get the income of the capital after her death; they are not entitled to any income whatever before. What he means is that the children are to share equally—in what? Why, in the residuary estate after the widow's death. He means that none of the children who have not been advanced or who have received less than others shall suffer: that is to say, that all the children shall, at the widow's death, take the same shares as they would have taken if no advances at all had been made. If that is so, then, for the purposes of division, you must consider the estate as ascertained at the death of the widow; and if it is not immediately divided you calculate interest from the widow's death as if no advances had been made; the interest being at the rate of four per cent. from that date. In calculating the interest in that way the children get the same shares as if there had been no advances.

But it was argued that the testator's intention, when he put this hotchpot clause into his will, was to put all his children on an equal footing, and that consequently those who had the benefit of those advances in his lifetime ought to be charged with interest from the time when the advances were made. But it is settled that you cannot claim interest on advances during the testator's lifetime. The children can only receive interest on the property to be divided and from the time fixed for division. Therefore charging interest is only to be regarded as a mode of calculation by which, in order to place the children on an equality, the estate is put in the same position as if no advances had been made.

It therefore appears to me, looking at the matter as one of principle, that it is a principle of equity to make a fair division among the children. That is really all that is done by the hotchpot clause. The cases do not throw much light upon the subject, though they do throw some.

The first case is *Andrewes* v. *George* (1), where the decision really turned on special words. There the testator directed the income of his personal estate to be paid to his widow for her life, and after her death the capital to be divided among his five children equally; and then, after reciting that he had made advances to some of his children, "he directed that his trustees should, before they made such division or distribution of his estate, deduct and take, from such of his said sons' and daughters' shares, so much money as had been advanced and lent to him, her, or them, by him, so as to render their shares quite equal and to the amount they would have been entitled to, had he not advanced the said sums of money, but that the whole had been remaining at his decease, and been attendant on the directions of his will." This last sentence explains what the testator's meaning was, and accordingly Vice-Chancellor *Shadwell* directed that interest at 4 per cent. should be computed on the advances from the death of the widow. That case is of very little assistance to me, because the Vice-Chancellor did not go into the principle upon which the question should be decided: he merely states the general law; but still it is a decision that interest should be computed only from the death of the tenant for life.

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(1) 3 Sim. 393, 394.

Then the next case is *Hilton* v. *Hilton* (1), before Vice-Chancellor *Malins*. In that case there was no previous life interest given, but, subject to an annuity to his wife, the testator empowered his trustees to apply the whole or so much as they should think fit of the income of his estate towards the maintenance of his children until the youngest should attain twenty-one, and then the capital was to be divided equally amongst all the children who attained twenty-one, or, being daughters, married under that age, except one son, for whom a different provision was made. Then, by a codicil, after reciting that he had made, or was about to make, advances to some of his children, the testator directed that all advances should be brought into hotchpot. The words of the will were very special, and the Vice-Chancellor, treating the case as depending to a great extent upon the wording of the will, held that the children must bring into account all sums which might have been received by them by way of advances from the testator, but with interest from the date of his death only.

(1) Law Rep. 14 Eq. 468.

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The next case I will notice is that of *Field* v. *Seward* (1), which has a slight bearing on the present case. There the question was whether interest on a sum of £2550, which the testator had advanced to a son to whom he had bequeathed a share of residue, should be charged as from the testator's death, or as from the end of a year after the death. The Vice-Chancellor *Bacon* seems at first to have been caught by the argument that since the son did not get possession of the share until a year from the testator's death, he ought not to be charged with interest until that date. "But," he goes on to say, "it is necessary, in order to carry out the testator's intention, that there should, as far as possible, be equality. Then, if this share produces interest, and the fund with the interest it produces is to be divided equally, you must charge the advance with interest in order to produce equality. There is no other means of doing it. The advanced son keeps the £2550. Is he also to keep the interest for a year which it would have produced? If he withholds for a year the contribution to the common fund, he must also be charged with the interest which it has produced during such withdrawal. Upon second thoughts, therefore, I think the contention that *John Seward* is chargeable from the death of the testator is the correct one." Observe his reasoning: it is, in effect, that the other children are to be just in the same position as if the advanced son had received no advances. That is to say, to produce equality in dividing the fund, you must, in the account, charge interest on the advance from the time when it would have produced interest as part of the common fund. So that the Vice-Chancellor's reason is exactly the same as that which I have given for saying that interest on advances is not chargeable during the lifetime of the widow.

There is one other case which is an authority in favour of my decision, though it assumes, rather than decides, the point. It is the case of *Poole* v. *Poole* (2). There the testator gave his property to his wife for life, and after her death directed his trustees to stand possessed of three-sixths of the capital and invest the same and pay the income of one-sixth to each of his three daughters during her life, and after her death to hold the capital in trust for her children equally. He then proceeded: "I never-

(1) 5 Ch. D. 538, 539.

(2) Law Rep. 7 Ch. 17.

theless subject and make chargeable the share of my said daughter *Margaret Beck* with the sum of £200 already advanced to her by me, and direct my trustees to deduct the same from the sum of money or share to which she would have been entitled under this my will, and add the same to the residue of my personal estate." Now that was not the clause upon which the decision of the Court of appeal proceeded; but the testator went on: "And I further direct that if, at the period of the distribution and investment of the several shares of my said daughters as aforesaid, my said daughter *Margaret Beck* shall be indebted to any or either of her said brothers or sisters in respect of advances made to her, that my said trustees shall be empowered to deduct all or any such debts or advances from her share as aforesaid, and to pay the same to the brother or sister to whom the same may be owing." That was the clause upon which the Court of Appeal went. It had been decided by the late Vice-Chancellor of the Duchy of *Lancaster* that the trustees were authorized to deduct from *Margaret Beck's* share not only the principal of certain debts which had been incurred by her to her brothers in the lifetime of the testator and his wife, but also interest from the time when they were incurred. The Court of Appeal, however, whilst agreeing with the Vice-Chancellor that the principal of the debts ought to be deducted, held that interest accruing on them before the estate became divisible ought not to be deducted. The Lord Justice *James*, in giving judgment, said (1): "The true meaning of the will appears to me to be, that advances made to *Margaret Beck* by her brothers and sisters were to be put on the same footing as if the testator himself had made them." That is to say, he assumes that interest was payable only from the death of the tenant for life. That is therefore an actual decision, or rather, I should say, an assumption. For he goes on, "I think the fair interpretation of the testator's words is, that he intended the advances to be allowed for as advances, not as debts; and that, therefore, only the capital ought to be taken into account, and not any interest accrued before the estate became divisible." Now there was nothing in the will about putting advances by the brothers and sisters on the same footing as if they had been made by the testator, but the Lord

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(1) Law Rep. 7 Ch. 19.

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In re Rees.
Rees *v.* George.

Justice thought that that was the meaning of it, and he thought the law as to advances made by a testator himself so clear that he bases his judgment upon it. I think that I am entitled to say that, so far as the Lord Justice considered the point, that is a clear expression of his opinion that the view of the law which I take is the correct one. If therefore the point depended upon authority, I should say that this last case decided it.

I therefore decide that interest on the advances is chargeable from the death of the widow, the tenant for life, and not from the death of the testator: and there will, accordingly, be a declaration that the children are bound to bring their advances into hotchpot with interest at 4 per cent. per annum from the death of the widow up to the distribution of the residuary estate.

Solicitors: *Warriner & Cross*, agents for *Gibbs & Llewellyn, Newport, Monmouthshire; Clarke, Woodcock, & Ryland; Hunt & Son*, agents for *C. R. Lyne, Newport, Monmouthshire.*

G. I. F. C.

M. R.
1881
April 29.

WALTER *v.* HOWE.

[1881 W. 1614.]

Copyright—Newspaper—Registration — Newspaper Article—Author—Injunction—Copyright Act (5 & 6 *Vict. c.* 45).

A newspaper is within the *Copyright Act* (5 & 6 Vict. c. 45), and requires registration under that Act in order to give the proprietor the copyright in its contents and so enable him to sue in respect of a piracy.

Cox v. *Land and Water Journal Company* (1) not followed.

Also, to enable the proprietor of a newspaper to sue in respect of a piracy of any article therein, he must shew, not merely that the author of the article has been paid for his services, but that it has been composed on the terms that the copyright therein shall belong to such proprietor.

THE Defendants, *Howe* and *Peddie*, having printed, published, advertised for sale, and sold a pamphlet entitled "*The Life and Work of Benjamin Disraeli* (*Earl of Beaconsfield*). Reprinted from the *Times*,"—being, in fact, a reprint of the biography or memoir of the late Earl of *Beaconsfield* which appeared in the

(1) Law Rep. 9 Eq. 324.

Times newspaper of the 20th of April, 1881,—the Plaintiff, *Walter*, on behalf of himself and all other the proprietors of the *Times*, now moved for an injunction to restrain the Defendants from further printing, publishing, selling, advertising for sale, delivering or otherwise disposing of the said pamphlet or publication, or any copy or copies thereof, and from further printing or publishing any reprint from the *Times* newspaper of the said biography or memoir of the late Earl of *Beaconsfield*, or any part of such biography or memoir, or any colourable imitation thereof, and from parting with the possession of any copies of the said pamphlet or publication then in their possession or under their control, and from otherwise infringing the Plaintiff's copyright in the said biography or memoir.

There was no evidence that the proprietors of the *Times* had purchased or were entitled to the copyright in the memoir beyond the fact that they had paid the author for his literary services in respect thereof; and the author was not a party to the action.

The *Times* is not registered at *Stationers' Hall* under the *Copyright Act* (5 & 6 Vict. c. 45).

Chitty, Q.C., *Ince*, Q.C., and *McSwinney*, for the Plaintiff:—

It will, no doubt, be urged against us that we are not entitled to sue, our newspaper not having been registered under the *Copyright Act*, but *Cox* v. *Land and Water Journal Company* (1) is a distinct authority that a newspaper does not require registration, and that the proprietor may, without registration, sue in respect of a piracy. As we have paid the author of the memoir for his services we are in fact entitled to the copyright in it.

Bond Coxe, for the the Defendants, was not called upon.

Jessel, M.R.:—

The evidence does not shew that the Plaintiff has within the 18th section of the *Copyright Act* paid the author of the memoir "on the terms that the copyright therein shall belong to" the Plaintiff; in other words, that the Plaintiff has bought and is entitled to the copyright; or that the author is not the owner of the copyright. Therefore, in my opinion, the Plaintiff is not entitled to sue without the author.

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(1) Law Rep. 9 Eq. 324.

But even if the Plaintiff has a copyright in the memoir, he is not entitled to sue, because his newspaper has not been registered under the Act. The 18th section says that "When any publisher or other person shall . . . . have projected, conducted, and carried on . . . . any encyclopædia, review, magazine, periodical work, or work published in a series of books or parts, or any book whatsoever, and shall have employed . . . . any persons to compose the same, or any volumes, parts, essays, articles, or portions thereof, for publication in or as part of the same, and such work . . . . shall have been composed on the terms that the copyright therein shall belong to such proprietor . . . . and paid for by him, such proprietor . . . . shall be entitled to copyright," and he is to be entitled to sue upon registration at *Stationers' Hall* under the 19th section. Now the words of the 18th section are of the most comprehensive kind: "Any periodical work"—a term which certainly includes a newspaper—"or any book whatsoever"; under the 2nd section the word "book" includes every "sheet of letterpress." In my opinion, therefore, to entitle the Plaintiff to sue, his newspaper must have been registered under the Act. I have been referred to the case of *Cox* v. *Land and Water Journal Company* (1), in which Vice-Chancellor *Malins* held that a proprietor of a newspaper can sue without joining the author and without registration under the *Copyright Act;* but, with all respect, I must decline to follow that decision, for it appears to me to be opposed to the plain wording of the Act of Parliament. If I were to decide in accordance with it I should, in my opinion, be virtually overruling the Act.

I therefore refuse the motion, with costs.

Solicitors: *F. L. Soames; G. T. Claxton.*

(1) Law Rep. 9 Eq. 324.

G. I. F. C.

In re WARNER'S SETTLED ESTATES.
WARNER TO STEEL.

M. R.
1881
June 2.

Succession Duty—Settled Estates Act, 1877 (40 & 41 *Vict. c.* 18), s. 22—*Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), ss. 39, 41, 42—*Vendor and Purchaser Act*, 1874 (37 & 38 *Vict. c.* 78).

The effect of a sale by the Court under the powers conferred by the *Settled Estates Act*, 1877, of any settled estates, is, by the operation of the 22nd section of that Act, to revoke the uses of the settlement; and by the operation of the 42nd section of the *Succession Duty Act*, 1853, the duty is shifted from the land sold to the purchase money or its investments, and the land in the hands of a purchaser is freed from the succession duty.

ADJOURNED SUMMONS.

This was a summons under the *Vendor and Purchaser Act*, 1874.

Edward Warner by his will devised all his real property, subject to the payment of a certain annuity, to his wife, *Maria Warner*, for life, and after her death he gave the same property to his son absolutely in case he should be then living, but in case he should be then dead leaving issue then living, then to such issue in manner therein mentioned, but in case he should be dead without leaving issue then living, then the testator gave the same property to his, testator's, brother absolutely, but in case he should then be dead without issue, then the property was to go as on an intestacy. The will contained no power of sale.

In June, 1880, an agreement was entered into between the testator's widow, son, and brother, and *T. J. Steel*, for the sale to *Steel* of a portion of the property devised by the will, and upon a petition presented under the *Settled Estates Act*, 1877, an order was made in July, 1881, confirming the contract.

Among the requisitions on the title delivered by the purchaser was the following, "all duty affecting the property agreed to be sold must be satisfied before the completion of the purchase." The duty payable on the annuity had been paid. The vendors insisting that no duty was payable until the death of the tenant for life, a summons was taken out by the purchasers, calling upon the vendors to shew cause why the succession duty expectantly payable on the death of the tenant for life should not be paid or compounded for by the vendors. This summons having been heard by the Master of the Rolls in Chambers, was at the request of the vendors adjourned into Court, and now came on to be heard.

Chitty, Q.C., and *E. S. Ford*, in support of the summons:—

The question is whether a purchaser buying under the *Settled Estates Act* can insist on the succession duty being compounded for or commuted under sects. 39 and 41 of the *Succession Duty Act*, 1853; or whether the 42nd section of that Act, which enacts that the duty shall be charged substitutively upon the successor's interest in the property acquired in substitution for the property before comprised in the succession, and in the meantime on his interest in the moneys arising from the exercise of the power of sale, applies to a sale by the Court under the *Settled Estates Act*, 1877.

In *Dugdale* v. *Meadows* (1) it was, no doubt, held upon the words of the 42nd section, that lands charged with the payment of a jointure, and which had been conveyed to the uses of a settlement, could be sold by the trustees under their power of sale free from the succession duty payable on the death of the jointress, but in Mr. *Davidson's* Precedents in Conveyancing (2) it is stated that the decision in that case is not recognised as valid by the Crown, and is manifestly wrong. But, even if the decision in that case is right, we submit that it has no application to this case, which is a sale under the *Settled Estates Act*, an Act which could not have been foreseen by the framers of the *Succession Duty Act*. We submit that the duty still attaches to the land in the hands of a purchaser, and must be either compounded for or commuted.

Ince, Q.C., and *Humber*, for the vendors:—

We submit that this sale under the *Settled Estates Act* is equivalent to a sale under the ordinary power of sale in a settlement, and that the duty is charged in substitution on the property to be acquired by the money resulting from such sale, and in the meantime upon the money itself. This is clearly the case as regards settled property sold under the ordinary powers of sale in a settlement: *Dugdale* v. *Meadows* (1). We submit that the property sold is not liable to duty.

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(1) Law Rep. 9 Eq. 212; Ibid. 6 Ch. 501.

(2) 4th Ed. vol. ii. p. 313.

[They also referred to *Hanson* on Succession Duty (2).]

JESSEL, M. R.:—

I am of opinion that the land is free from succession duty. First, I will consider the ordinary case of a sale under a power contained in a settlement. The effect of the exercise of the power in the settlement is to revoke the uses, and consequently there is no succession left, there is nothing on which the duty can be charged, and if there were no succession duty on personal property the land would be free and the purchase-money too, but where there is a power of sale and a trust to lay out the money in the purchase of land, in the meantime until so laid out it is a settlement of the purchase-money. In this way the Crown takes this duty out of the purchase-money, as it would take it in respect of the land when the permanent investment was made. But the settlement of the land originally settled is entirely destroyed by virtue of the overriding power contained in the settlement itself, and with the destruction of the settlement the right to duty in respect of the land originally comprised in it goes. That being so, in my opinion, there would be no duty payable in respect of the land in the hands of the purchaser. I am led to assume that this is following the view taken by the advisers of the Crown, because it is so stated in both editions of Mr. *Hanson's* book, which I have before me, and Mr. *Davidson*, on the page to which I have been referred by Mr. *Chitty* (3), and just above the passage he read, states that the operation of the 42nd section of the *Succession Duty Act* on an exercise of a power of sale, is to shift the duty to the purchase-money or its investments. The text-writers, therefore, agree that that is the true view of the Act. I should not have any difficulty without the assistance of the text-writers, but it is very satisfactory to find they have considered it independently in the same way.

This, however, is not a sale under a power of sale, but under the provisions of the *Settled Estates Act*, 1877, and the question is

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(1) Law Rep. 9 Eq. 212; Ibid. 6 Ch. 501.

(2) 2nd Ed. p. 278; 3rd Ed. p. 232.

(3) 4th Ed. vol. ii. p. 313.

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—is it also a sale which gets rid of the very succession as to which duty is claimed?

Now the 22nd section of the *Settled Estates Act*, 1877, says that the exercise of the power of the Court under that Act shall take effect as if there had been a power in the settlement exerciseable so as to operate by revocation and reappointment of the use. This being so, the result is exactly the same as if the limitation of uses had been revoked by a power contained in the settlement itself. The reasoning on the first supposition, therefore, exactly applies, and consequently I shall declare that no succession duty is payable by the purchaser or otherwise in respect of the estate. Of course it will be payable as regards the purchase-money or any future investment of it. The summons will, therefore, be dismissed with costs.

Solicitors: *H. J. Godden; Sewell & Edwards.*

G. M.

ENGLISH CHANNEL STEAMSHIP COMPANY *v.* ROLT.

V.-C. M.
1881
Feb. 16, 21.

[1879 W. 449.]

Company—Directors—Mortgage—Ultrà Vires—Limit—Capital not called up—Shares not issued.

Among the objects of a company was to purchase ships; and the directors were empowered to do all needful acts in furtherance of the objects of the company; they were also expressly authorized to borrow, on the security of the property of the company, any sum of money not exceeding two-thirds of the capital of the company not called up.

The directors mortgaged a ship, the only property of the company, to secure the payment of a sum of money advanced to the company, and of unpaid purchase-money of the ship; the amount so secured much exceeding two-thirds of the amount not called up of the shares actually issued, but being within two-thirds of the whole nominal capital not called up:—

Held, that the mortgage was within the powers of the directors, and was valid; and that the term "capital not called up" included shares which had not been issued.

THE *English Channel Steamship Company* was registered under the *Companies Act*, 1862, in 1872. The capital was to be £100,000 in 10,000 £10 shares. Among the objects of the company, as set forth in the memorandum of association, were "To purchase, build, and construct and manufacture, or cause to be purchased, built, and constructed and manufactured for use and sale all kinds of ships, vessels, steamers, and boats." And amongst the powers were, "To borrow money and to issue transferable bonds to bearer or otherwise, debentures, mortgage debentures, and promissory notes, based and secured on all or any of the property and assets, real or personal, of the company;" "To transact and do all such matters and things as are conducive or incidental to the attainment of the above objects, or any of them." By the articles of association the word "capital" was defined to mean "the nominal capital from time to time of the company or (as the context may require) the capital money from time to time of the company." The following articles were referred to:—

82. The business of the company shall be managed by the directors. They shall be at liberty, in furtherance of the business or objects of the company, or in anticipation of the wants of the

company, or by way of precaution against damage or loss that the company might in their judgment become exposed, to enter into all contracts in the exercise of the powers hereby or by the memorandum of association granted to the directors, as shall be needful, and generally to do all acts, deeds, and enter into all contracts whatsoever for enabling or facilitating or furthering the carrying on of the company and its business, as described in the memorandum and articles of association, or as shall be by the directors considered necessary or advantageous.

83. The directors may commence and prosecute the objects of the company notwithstanding that the whole of the shares have not been issued or taken up.

86. The directors shall have power from time to time to raise and borrow upon the security of that portion of the capital not called up, or of the other property and assets of the company real or personal, and for the purposes of its business, on mortgages, bonds, debentures, promissory notes, or otherwise, any sum of money not exceeding two-thirds of the capital of the company for the time being not called up.

Sub-sect. 6. 87. They may let, mortgage, sell, transfer, grant license for working patents, or otherwise dispose of, either absolutely or conditionally, and in such manner and upon such terms and conditions in all respects as they think fit, any of the property, real or personal, or securities of the company, and may accept payment or satisfaction for any property so disposed of in fully paid-up or other shares, or partly in shares and partly in cash, or in such other manner as the directors may deem expedient.

Only 3321 shares in the company were issued.

Soon after the company was formed, the ship *Castalia* was built for them by the *Thames Ironworks and Shipbuilding Company*, for whom the Defendant *Peter Rolt* was trustee. About £4000 was in 1874 due to the *Shipbuilding Company* as part of the price of the ship. In that year the *Steamship Company* applied to the Defendant *Webster*, as agent for the *Credit Foncier of England*, for an advance. And ultimately, on the 27th of October, 1874, the *Steamship Company* executed, in the statutory form, a deed of mortgage of the *Castalia* to *Rolt* and *Webster*, to secure the repayment to them of £20,000, with interest at the rate of 10 per cent. The circumstances under which the mortgage was executed were not stated in the pleadings, beyond that out of this £20,000 £16,315 was for money advanced by *Webster*. From the evidence it appeared that the rest was by way of security to *Rolt* for the unpaid purchase-money of the *Castalia*.

In November, 1876, the *Steamship Company* was ordered to be wound up. There was some dispute as to the possession of the *Castalia*, but it seemed that both before and since the winding-up she had been in the possession of *Rolt* and *Webster*.

The official liquidators of the *Steamship Company* obtained leave to bring, and brought, this action to have the mortgage of the *Castalia* declared invalid, as not within the powers of the directors; or, in the alternative, that it ought to stand as a security for £2052 only, as being the two-thirds of the amount not called up on the shares issued (after certain deductions).

J. Pearson, Q.C., and *Northmore Lawrence*, for the company:—

The power of borrowing is limited to the amount of two-thirds of the capital not called up, but that must mean on the shares actually issued, not on the imaginary shares. The power of borrowing is very dangerous, and has properly been limited by the articles. To the extent that the mortgage exceeds the limit it is invalid: *In re Pooley Hall Colliery Company* (1); *Irvine* v. *Union Bank of Australia* (2).

Higgins, Q.C., and *H. B. Buckley*, for *Webster*:—

The directors of a company have at law a power to borrow money for the purposes of the company: *Gibbs and West's Case* (3); *In re Patent File Company* (4); and here they have also express powers of borrowing within certain limits. The word "capital" cannot be confined to shares issued, and must mean the nominal capital mentioned in the articles. But, besides, the directors have the largest general powers. Part of the money was due for the ship, and there is no allegation that the rest was not fairly borrowed for the wants of the company: *In re Hamilton's Windsor Ironworks* (5).

(1) 18 W. R. 201.

(2) 2 App. Cas. 366.

(3) Law Rep. 10 Eq. 312.

(4) Ibid. 6 Ch. 83.

(5) 12 Ch. D. 707.

Glasse, Q.C., and *Latham*, for *Rolt*:—

The builders had a lien on the ship for the unpaid purchase-money, and it would be shocking if they were held to have lost that lien by taking an additional security: *In re Anglo-Danubian Steam Navigation and Colliery Company* (1).

J. Pearson, in reply:—

No doubt the general law is that directors may borrow; but when distinct powers are given by the constitution of the company the general borrowing power is limited. The only capital is that which was subscribed for, the rest is neither property nor assets, and is merely imaginary, so that the borrowing power is, in fact, limited to two-thirds of the subscribed capital.

MALINS, V.C., stated the facts of the case, and read extracts from the memorandum and articles of association, and observed that though by the 83rd article the directors were empowered to commence business notwithstanding that the whole of the shares had not been taken up, yet it was an act of imprudence on their part to commence and to contract for a ship which must cost between £30,000 and £40,000 when only so few shares had been subscribed for. Still it was not dishonest, and they probably believed that the whole capital would be forthcoming. His Lordship then proceeded:—

However, having had the ship built, it is perfectly clear that they were bound to pay for it. It would have been dishonest if they had refrained from paying for it. Having received about £30,000, if they had stopped at that time and thrown the ship upon the hands of the *Thames Shipbuilding Company* without paying for it, and had refused to give a mortgage, they would, in my opinion, have acted in a most improper manner, and therefore, so far from the directors being blamable in doing what they did, I think they did what is perfectly right, and what the Court is bound to support if possible.

Now, during the argument some authorities were cited to me as to the principle upon which joint stock companies are allowed to proceed in borrowing money. I quite agree with what Mr. *Pearson*

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(1) Law Rep. 20 Eq. 339.

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has argued, that where there is a limit the directors are not at liberty to go beyond that limit, and I entirely agree with the decision in *In re Pooley Hall Colliery Company* (1), in which case a company authorized to borrow £8000 had exceeded that power of borrowing and had issued debentures; the Master of the Rolls held that that was entirely *ultrà vires*, and, therefore, that no good debt was created. So it would be here if it was perfectly clear that they had borrowed beyond the extent of two-thirds of the capital which they had the power of calling up; it would have been *ultrà vires*, and no good debt would have been created here. Mr. *Higgins* argued, and I think that there was a good deal of force in the argument, although I do not mean to rest my decision upon it, that there are two powers, the one as to borrowing contained in the 86th article, and the other as to mortgaging contained in the 87th. [His Lordship read them.] In this last article there is a general power of mortgaging the property of the company; were they then justified in mortgaging the property? I have shewn already, according to my view of it, that they were justified in entering into a contract for building the ship; and if so, they were bound to pay for it by mortgaging the ship itself, which is all the property they had. Could anything be more proper; and would it be right in the Court, unless it was absolutely constrained by inevitable construction, to come to the conclusion that that is improper, and that Mr. *Rolt*, whose money supplied the only assets of the company, is not to be paid? It has been argued here on behalf of the liquidators that the persons who built the ship, whose money produced the only assets they have got, and who might have detained her, and might have treated her according to the usual conditions contained in a contract for building a ship, should not be paid, because the directors did that which, in my opinion, it was their obvious duty to do. It would be encouraging dishonesty if I came to any other conclusion than that which I come to, unless I were satisfied that the articles of association prohibited that which has been done.

But when I look at the 86th article, what is it that they are prohibited from doing? What is the capital not called up? In the definition clause capital is defined to mean "the nominal capital from time to time of the company or (as the context may require) the capital money from time to time of the company." The capital of the company is £100,000, but Mr. *Pearson* said, "How can you reckon as capital that which has not been issued?" It is a very common thing indeed for companies to do so, and it is not at all contrary to usage in companies to consider that where they have a power of issuing capital they have a right to treat it as capital. If they believe there to be a prospect of getting the capital issued, as no doubt all these gentlemen did, that is capital within the meaning of this article. They are not to borrow a sum of money "exceeding two-thirds of the capital of the company for the time being not called up." That may mean shares not issued or shares issued and not called up.

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(1) 18 W. R. 201.

In my opinion, looking at the nature of the transaction—looking at the fact that the directors of every joint stock trading company ought to be armed with the power of borrowing for the purpose of carrying on business as long as they keep within the limits, they were right in doing what they did. Mr. *Pearson* agreed with the law as laid down by myself in *Gibbs and West's Case* (1). He is content to take it as I laid it down there, that it is to be a reasonable sum, but he says that this is an unreasonable sum. In my opinion, considering the situation of the parties at the time, it was a perfectly reasonable sum; and therefore the case falls within the rules there laid down. If it had been the object of the shareholders that the directors should only borrow to the extent of two-thirds of the shares actually issued, the articles ought to have said so.

I am therefore of opinion that this action brought to set aside this mortgage entirely fails, and must be dismissed with costs in the usual way to be paid by the liquidator out of the assets of the company.

Solicitors for Plaintiffs: *W. A. Crump & Son.*
Solicitors for Mr. *Rolt*: *F. Heritage & Co.*
Solicitor for Mr. *Webster*: *E. Andrew.*

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(1) Law Rep. 10 Eq. 312.

C. M.

NOBEL'S EXPLOSIVES COMPANY *v.* JONES, SCOTT, & CO.

[1879 N. 53.]

C. A.
1880
V.-C. B.
April 13, 14, 15, 20, 29.
1881
C. A.
April 27.

Patent for protecting Explosives—Foreign Manufacture according to Patent Process—Transhipment in British Waters—Continuing User—Custom House Agency—Practice—Amendment at Hearing—Rules of Court, 1875, *Order* XXVII., *r.* 2.

A patent having been granted in this country for making the handling of nitro-glycerine less dangerous, by causing it to be absorbed in porous unexplosive substances, a material manufactured abroad by the patent process, was imported into British waters:—

Held, by *Bacon*, V.C., that such importation, though for the purpose only of transhipment for exportation, and not for the purpose of having the material landed and stored in this country, was a continuing user in this country of the invention, and hence an infringement.

At the trial of an action for alleged infringement of a patent by the importation into British waters of a material manufactured abroad according to the patent process, for the purpose of having it transhipped for exportation, evidence was given that the Defendants had acted as Custom House agents for the foreign manufacturing firm, in getting the goods landed and stored in this country:—

Leave given to the Plaintiff, at the hearing of the trial, to amend the statement of claim by alleging this practice, and that such practice was an infringement.

Held, by the Court of Appeal (reversing the decision of *Bacon*, V.C.), that the acting as Custom House agents for an importing firm was not an infringement of an English patent, although the importation might have been itself an infringement.

affirmed by H of L. 8 App Cas. 5

ON the 23rd of April, 1877, the Plaintiffs, *Nobel's Explosives Company, Limited,* took an assignment from a former company called the *British Dynamite Company, Limited,* of certain letters patent dated the 7th of May, 1867, and granted to one *William Edward Newton.*

The *British Dynamite Company* was at that time in voluntary liquidation, for the purpose of changing its name.

The nature of the invention was set forth in the following clause of the specification :—

"This invention relates to the use of nitro-glycerine in an

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altered condition which renders it far more practical and safe for use. The altered condition of the nitro-glycerine is effected by causing it to be absorbed in porous unexplosive substances, such as charcoal, silica, paper, or similar materials, whereby it is converted into a powder, which I call dynamite or *Nobel's* safety powder. By this absorption of the nitro-glycerine in some porous substance it acquires the property of being in a high degree insensible to shocks, and it can also be burned over fire without exploding."

The specification then set forth a special mode of firing the powder; and the patentee claimed as follows:—

"I claim as the invention secured to me by letters patent as aforesaid the mode herein set forth of manufacturing the safety powder or dynamite herein described, and also the modes of firing the same by special ignition as herein set forth."

The novelty and utility of this invention, and the sufficiency of the specification, were established by a decree of the House of Lords on the 7th of April, 1879, in an action of *British Dynamite Company* v. *Krebs.*

The writ in the present action was issued on the 16th of May, 1879, against the Defendants, Messrs. *Jones, Scott, & Co.* of 22, *Basinghall Street,* to restrain infringement, and the following passages in the pleadings, cited by the Vice-Chancellor in giving judgment, explain the nature of the claim and of the defence.

The original statement of claim, delivered on the 16th of June, 1879, alleged as follows:—

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"4. The Plaintiff company's agents quite recently discovered and for the first time, according to the fact, that the Defendants have at different times purchased from Messrs. *Krebs & Company,* of *Cologne,* large quantities of a substance called lithofracteur, which is a compound of nitro-glycerine absorbed in porous unexplosive substances, and the manufacture or user of which is an infringement of the said letters patent.

"5. Such lithofracteur, purchased by the Defendants, has been from time to time brought from *Cologne* to and delivered on board ships at the mouth of the *Thames* in British waters, and from thence carried to *Australia* and sold there; and they have, for the purpose of such exportation and sale, kept the said lithofracteur either ashore or afloat in British waters, until they should find opportunities of shipping the same."

The Plaintiffs claimed an injunction to restrain the Defendants, their servants and agents, during the subsistence of the Plaintiffs' letters patent of the 7th of May, 1867, or any extension thereof, from manufacturing or selling a certain compound called lithofracteur, or any compound consisting of or containing nitro-glycerine absorbed in any porous unexplosive substance; or from transhipping, importing, or exporting, into or from any part of *Great Britain*, or from moving, or attempting to move from any place to any other place, any lithofracteur or such other compound as aforesaid.

By an amended statement of defence, delivered on the 25th of July, 1879, the Defendants stated, amongst other things, as follows:—

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"2. The Defendants admit that they have at different times, prior to the said 23rd day of April, 1877, but not since, purchased from Messrs. *Krebs & Company*, of *Cologne*, quantities of a substance called lithofracteur, and that lithofracteur is a compound of nitro-glycerine absorbed in porous unexplosive substances; but they deny that by such purchases they in any way infringed the rights in the Plaintiff company in the said letters patent.

"3. The Defendants admit that such lithofracteur has been from time to time, but not since the 23rd of April, 1877, brought from *Cologne* to and delivered on board ships at the mouth of the *Thames* in British waters, and from thence carried to *Australia* and sold there, as alleged in the 5th paragraph of the statement of claim; but they deny that they have at any time kept any of the said lithofracteur either ashore or afloat in British waters until they should find opportunities of shipping the same; and the Defendants further say that all such lithofracteur arrived at the mouth of the *Thames* from *Cologne* aforesaid in sealed cases, and was delivered in the same on board ships at the mouth of the *Thames* for carriage to *Australia*."

On the 13th of April, 1880, the action came on for trial.

It happened that one of the Defendants had been obliged to leave this country owing to the illness of the other Defendant in *Australia*, and the Plaintiffs' counsel were obliged to prove their case by the testimony of a hostile witness, namely, *Henry Meyer*, a clerk of the Defendants, whom they called for that purpose.

In the course of his examination, *Meyer* deposed that the goods referred to in a paper signed by him as clerk of the importers, *Jones, Scott, & Co.*, in May, 1877, were placed on board a lighter duly licensed to carry explosives, to be transhipped either to export ships, or to a store, but whether they went to a store or not, he could not say. The goods could only be passed through the Custom House by one firm, whether they were the importers or whether they were the consignees. His sole duty was to pass the goods through the Custom House at *Gravesend*. In cross-examination he stated that the goods were all along those of *Krebs & Co.*, and that the Defendants had no interest in them except as agents to pass them through the Custom House for *Krebs & Co.* It was *Krebs & Co.* who hired the lighters; and *Jones, Scott, & Co.* did not even hold a license to import dynamite. What the witness did was to take the landing papers, that is, the permission to take the goods out of the import vessel, to the office of the controller, who in this instance was the tide surveyor at *Gravesend*, to be indorsed, then to take them to the registrar's office, to be passed as to quantity, value, and proper description, and then to leave them at the Custom House at *Gravesend*.

Upon this, the Plaintiffs' counsel asked for leave to amend the statement of claim.

Aston, Q.C., and *E. Cutler*, for the Plaintiffs, cited *Budding* v. *Murdoch* (1); and *King* v. *Corke* (2).

Sir *H. Jackson*, Q.C., and *Goodeve*, *contrà*.

BACON, V.C., allowed the amendment.

Accordingly, by an amended statement of claim, the Plaintiffs alleged as follows:—

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"5*a*. The Defendants, at divers times since April 23rd, 1877, and in particular, in the month of May 1877, in July 1878, and in December 1878, imported and delivered, or caused to be imported and delivered, or had consigned to them or received as agents or owners in the River *Thames*, in the port of *London*, and transhipped or caused to be transhipped, and stored in that port, either as owners or agents for the owners, large quantities of lithofracteur.

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(1) 1 Ch. D. 42.

(2) 1 Ch. D. 57.

"5*b*. The Defendants, at the times above mentioned, received or dealt with as owners, or as agents for the owners, large quantities of lithofracteur, and took the same under their control, and caused the same to be delivered, transhipped or stored in the said port.

"5*c*. The aforesaid conduct on the part of the Defendants is and was an infringement of the Plaintiff company's said letters patent; for it would have been impossible, having regard to the statutes in that behalf, to bring any explosive compounds containing nitro-glycerine, or tranship or store the same within the territorial limits of *Great Britain*, without making such compound safe by means of the Plaintiffs' said invention."

The Defendants delivered a defence to the last-mentioned pleadings, alleging as follows:—

"3*a*. In reference to paragraphs 5*a* and 5*b* of the amended statement of claim the Defendants deny that they have at any time or times since the 23rd day of April, 1877, either imported or delivered, or caused to be imported or delivered, or had consigned to them or received as agents or owners in the River *Thames*, in the port of *London*, or have transhipped or caused to be transhipped or stored in that port, either as owners or as agents for the owners, any lithofracteur whatever, as alleged. And the Defendants further deny that they have at any time or times since the 23rd day of April, 1877, either received or dealt with as owners, or as agents for the owners, any lithofracteur, or have taken the same under their control, or have caused the same to be delivered or transhipped or stored in the said port as alleged.

"3*b*. The only intervention which the Defendants have made, or with or in which they have been concerned or taken part in relation to lithofracteur since the 23rd of April, 1877, has been the acting as 'Custom House agents,' in reference to obtaining on behalf of Messrs. *Krebs & Co.*, of *Cologne*, the real owners of such lithofracteur, permission for the discharge thereof from the ships into lighters. As such Custom House agents the Defendants' function was confined to obtaining papers necessary for such transhipment, and they never had any ownership in or exercised any control over the said lithofracteur. The Defendants were in no sense the importers of the said lithofracteur, though, in order to comply with the forms in use at the Custom House, they appear to have been so described in some of the papers as sent in by them; but, notwithstanding the use of the word, the real nature of the Defendants' employment was explained to and well understood by the Custom House officers."

From correspondence and papers which were produced it appeared that in answer to a letter from *Jones, Scott, & Co.* to the Commissioners of Customs, dated the 9th of May, 1877, announcing the arrival by the ship *Edward Austin* of seventeen cases of detonators and 1200 cases of lithofracteur, the licenses were made out, for the detonators to *Jones, Scott, & Co.*, and for the lithofracteur to *Krebs Brothers & Co.* In a later instance, that of the ship *John Prizeman*, *Jones, Scott, & Co.* stated that they acted "as the agents of Mr. *P. J. Nursey*," whose license they enclosed. *Nursey* was a clerk of *Krebs & Co.*

From other evidence, adverted to and summed up in the judgment, it appeared that these cargoes were taken to warehouses belonging to *Krebs & Co.* at the mouth of the *Thames*, and that portions of them were sold, and the rest sent back to *Cologne*.

The action came on again on the 20th of April, 1880. The legal points were argued partly at the former hearing and partly at this; but all the arguments, for convenience, are reported together.

Aston, Q.C., and *E. Cutler*, for the Plaintiffs:—

If any one in this country is benefited by the conduct of the Defendants, that conduct is a user of the patent in this country. It makes no difference whether the protecting matter is applied to the nitro-glycerine abroad, or in this country; the protection itself is a continuing user: *Neilson* v. *Betts* (1); *Caldwell* v. *Vanvlissengen* (2); *Upmann* v. *Elkan* (3). The user of the patent is the making the article safe, and hence making its importation permissible under the regulations of the *Explosives Act* (38 & 39 Vict. c. 17, s. 40). The above principle was recognised in *Elmslie* v. *Boursier* (4); *Adair* v. *Young* (5); *Von Heyden* v. *Neustadt* (6). In *Neilson* v. *Betts*, the capsule case, it would have been possible to import the beer without the capsules; but in this case it would be impossible to obtain an importation license without the use of the Plaintiffs' or some similar invention.

We allege several breaches prior to the 23rd of April, 1877, and if it be contended that the right of the *British Dynamite Company* to sue did not pass to us, we then ask leave to amend by making the liquidator of the *British Dynamite Company* a party.

Sir *H. Jackson*, Q.C., and *T. M. Goodeve*, for the Defendants, opposed the application.

By reason of the voluntary liquidation the company is dissolved; *Companies Act*, 1862, sect. 145; *Lindley* on Partnership (7); *Buckley* on Companies (8). The company itself having no right to sue, cannot assign a right of suit to another.

E. Cutler, in reply.

BACON, V.C.:—I think the Plaintiffs must confine their case to the alleged breaches since the assignment of the 23rd of April, 1877. It is now too late to amend in the way they seek.

Sir *H. Jackson*, Q.C., and *T. M. Goodeve*, for the Defendants:—

We admit that *Jones, Scott, & Co.* did formerly import lithofracteur as agents for *Krebs & Co.*, but we deny that they have done so since the 23rd of April, 1877.

To assist in the removal of these goods from an importing to an exporting vessel in the port of *London*, cannot be within either of the words to "make, use, exercise, or vend;" nor within the words "make, use, or put in practice the said invention": *Minter* v. *Williams* (1).

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(1) Law Rep. 5 H. L. 1.

(2) 9 Hare, 415.

(3) Law Rep. 12 Eq. 140; Ibid. 7 Ch. 130.

(4) Law Rep. 9 Eq. 217.

(5) 12 Ch. D. 13.

(6) 14 Ch. D. 230.

(7) 4th Ed. p. 1470.

(8) Page 265.

Adair v. *Young* was decided (*James*, L.J., *dissentiente*) on the special ground that the captain would certainly use the pumps. *Neilson* v. *Betts* (2) has no application, because in that case there was a continuing user of the invention. Here there has been no user; the goods have been simply transhipped to be used elsewhere.

As it was put by Vice-Chancellor *Wood*, in *Betts* v. *Neilson* (3), these were merely "foreign goods lying packed up in a ship in one of the English harbours." The point was put by Mr. Justice *Maule* in this way: "If a patent is granted for a new mode of manufacturing some substance—if a person uses that mode, he infringes the patent. But when the patent is for an improved implement of ordinary use, the question is, whether the mere user of that implement would amount to an infringement. Suppose there is a patent for making an improved carriage, and a gentleman buys a carriage of that improved construction, and drives it on the road, is he guilty of infringing the patent when it turns out that it was manufactured by a person who had not a license from the patentee?" *Holmes* v. *London and North Western Railway Company* (4). Can it be said that every human being who touches the spurious article is guilty of infringement? If a ship stranded in the river had been blown up by means of this lithofracteur, it would have been a different thing.

The action of the Defendants was merely the performance of a mechanical function in passing the goods through the Custom House. There was no user of the invention on their part.

Aston, in reply:—

Even on the admitted importation up to April, 1877, an injunction would lie: *Losh* v. *Hague* (5).

The whole transaction is now apparent. *Krebs & Co.* wanted to get imported into this country goods made by this patented process in some way or other; for this purpose it was necessary to procure some one to have the goods passed through the Custom House; and the Defendants supplied the means of accomplishing the unlawful design.

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(1) 4 Ad. & E. 251.

(2) Law Rep. 5 H. L. 1.

(3) 6 N. R. 221; 12 L. T. (N.S.) 489.

(4) Macrory, 4, 21.

(5) 1 Webster, 200.

Sykes v. *Howarth* (1) is an illustration of the distinction between "putting in practice" an invention, and "using" it; either being within the purview of the statute.

April 29. BACON, V.C.:—

In this action the Plaintiffs, who are the proprietors of letters patent dated in 1867, for the "invention of improvements in explosive compounds, and in the means of igniting the same," complain that the Defendants have infringed the Plaintiffs' rights under the patent. The Defendants dispute the Plaintiffs' right to maintain the action upon two grounds. First, they contend that what has been done by them does not amount to an infringement of the rights conferred by the patent; and, secondly, they say that in what they have done they have acted merely as agents, and without having any personal interest, and have therefore incurred no liability in the matter. The questions which are thus raised are somewhat novel, and, perhaps, not without difficulty.

The highly dangerous nature of nitro-glycerine and its compounds, arising partly from the facility with which they explode from their sensibility to shocks or other external violence, have given occasion to the establishment of various regulations respecting the dealing in and transmission of such substances, and especially by the *Explosive Substances Act*.

By the 38 & 39 Vict. c. 17, s. 40, it is enacted that, "The owner and master of any ship having on board any such explosive shall not permit the same to be unloaded and delivered to any person who does not hold a license to import the same (in this Act called an importation license) from the Secretary of State, and any transhipment shall, for the purpose of this section, be deemed to be delivery; and the Secretary of State may grant an importation license for any such explosive, and may annex thereto any prohibitions and restrictions with respect to the composition and quality of the explosive, and the unloading, landing, delivery, and conveyance thereof, and such further provisions and restrictions as he may think fit, for the protection of the public from danger."

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(1) 12 Ch. D. 826, 832.

A method having been discovered by which the dangers arising from nitro-glycerine might be, at least in a great degree, avoided, that invention formed the subject of the Plaintiffs' patent, which is thus described in the specification. [His Lordship read the extract given above, and continued:]—And the claim is in these terms. [His Lordship read the claim, and continued:—] By means of the invention a substance called lithofracteur has been produced, and is well known as an article of commerce, and is extensively manufactured and dealt in by the Plaintiffs. The validity of the patent has been established after much litigation by a recent decision of the House of Lords in a cause of the *British Dynamite Company* v. *Krebs and Others* (7th of April, 1879). The company, Plaintiffs in that action, which was entitled to the patent, has ceased to exist, and the letters patent, and all right and property thereto belonging, have become and are vested in the Plaintiffs in this action; their title so acquired being under a deed of assignment dated the 23rd of April, 1877.

Messrs. *Krebs,* who were the Defendants in the action I have referred to, are manufacturing chemists in *Cologne.* The present Defendants are merchants carrying on business in *London,* and a part of their business did and does consist in exporting dynamite or lithofracteur to *Australia* and elsewhere. It appears that they at one time had extensive dealings with the firm of *Krebs & Co.* They were parties to the suit of *British Dynamite Company* v. *Krebs,* but, under circumstances which are not clearly explained before me, they were dismissed from that suit. An agreement between the two firms has been put in evidence, from which it appears that the Defendants had been more than the mere agents of *Krebs & Co.,* and that they, in fact, dealt in the explosive articles manufactured by the latter; but it is said by some of the Defendants' witnesses that the agreement came to an end several years ago.

The Plaintiffs, in their original statement of claim, alleged as follows:—[His Lordship proceeded to read the extracts from the pleadings set out above, and continued:—]

The facts undisputed are that Messrs. *Krebs & Co.* imported from *Maasluys*, in *Holland*, into the port of *London*, in May, 1877, 1200 cases of lithofracteur by a ship called the *Edward Austin;* in July, 1878, a like quantity of the same explosive by the ship *J. Prizeman*, and upwards of 700 cases of the same by the ship *Castalia* in December, 1878. Bills of lading for these articles were made out in the name of *Krebs & Co.*, who had then a counting-house in *London*, and were indorsed by their manager here, and delivered to the Defendants. Applications were made in the ordinary course of business by Mr. *Meyer*, a clerk of the Defendants, to the Custom House for delivery orders for these cargoes, accompanied by a written declaration stating that the Defendants were the importers of the goods, and letters in the handwriting of *Meyer*, and signed by the Defendant *Jones*, were upon each occasion addressed to the Custom House authorities, asking for leave to take delivery of the goods, and enclosing the importation license required by the statute.

The clerk *Meyer*, furnished with the authority granted at the Custom House, in compliance with the Defendants' written requests, and holding the bills of lading and the importation license, proceeded to the three ships I have mentioned, which were then lying in the river, and procured the delivery of the several cargoes, and transhipped them into lighters; but he said in his examination that he could not tell what became of them afterwards. This deficiency was, however, supplied by two of the Defendants' witnesses (*Seyd* and *Nursey*), who knew and proved that all the three cargoes were carried from the ships in which they had been imported to warehouses which had been built for *Krebs & Co.* at *Benfleet*, near the *Nore*, constructed in the manner prescribed by Government for the purpose of storing explosives, and in respect of which the statutory license before mentioned had been obtained. It appears, also, that of the quantities thus dealt with half of them have been sold in *England*, a part remains in store, and the rest has been sent back to Messrs. *Krebs* at *Cologne*.

Stopping at this part of the case, I have to consider the first ground on which the Defendants rely. It has been argued on their part that the manner in which the lithofracteur was dealt with does not constitute a user or exercise of the Plaintiffs' patent; that the merely procuring the delivery from the ships in which the commodity was carried, and the subsequent transhipment thereout into lighters, by which it might be carried elsewhere, such acts being done within this realm, were innocent acts by the Defendants, by which they neither used nor exercised the invention which is the property of the Plaintiffs.

Having regard to the nature of the invention, and that its most essential quality is that it acquires for nitro-glycerine "the property of being in a high degree insensible to shocks," it appears to me that it is impossible to tranship, or in any manner to handle or move the commodity made according to the invention, without at the same time using the invention.

In *Betts* v. *Neilson* (1), a case I am about to mention more particularly, the invention consisted of a method of combining metals of which capsules were made, and when made, usefully applied, to bottles of liquid, whereby external air was excluded and the contents protected from deterioration. The Defendants bottled beer in *Scotland* to which they applied the patentee's invention, and sent it so bottled to *England*, not for sale there, but for the purpose of being exported thence to foreign parts. The Defendants there insisted that doing this was no infringement; that the beer was merely *in itinere* in *England;* and that its resting there with English agents was no such active use of the capsules as could constitute an infringement. It was decided in that case, as well by the Vice-Chancellor *Wood* as by the Lord Chancellor, and subsequently in the House of Lords, that this was a direct infringement of the patent.

The Vice-Chancellor said (2), "The capsules then were in use for the very purpose for which they were invented."

The Lord Chancellor (*Chelmsford*), on hearing an appeal from the Vice-Chancellor, expressed himself thus: "With respect to the case of the article being brought into an English port and remaining on board the vessels, and transhipped for exportation, if the mode of transmission adopted by the Defendants amounts to the user of the capsule in *England*, I can see no distinction on principle between the patented article being placed in a warehouse on land, and the ship in which it is brought from *Scotland* being made the warehouse until it can be put on board another vessel for exportation" (1). And, again: "It is the employment of the machine or the article for the purpose for which it was designed which constitutes its active use; and whether the capsules were intended for ornament, or for protection of the contents of the bottles upon which they were placed, the whole time they were in *England* they may be correctly said to be in active use for the very objects for which they were placed upon the bottles by the vendors" (2).

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(1) Law Rep. 3 Ch. 429.

(2) 6 N. R. 221, 222.

In an earlier case relating to the use by foreigners within the British dominions of an English patent—*Caldwell* v. *Vanvlissengen* (3)—the Vice-Chancellor *Turner* having observed that foreigners are subject to actions for injuries done by them whilst here to the subjects of the Crown, decided that the user by the Defendants, being for the purposes of their trade and as the means of increasing their profits, was a direct use within the words of the patent. And this case was recognised and adopted in the judgments in *Betts* v. *Neilson*.

Upon these authorities, then, as well as upon the facts in evidence, I can entertain no doubt that there has been a direct infringement of the Plaintiffs' rights under the patent.

But then the Defendants insist, besides, that they were under no liability to the Plaintiffs for what has been done. They deny, in their amended statement of defence, that they have ever caused to be delivered, or received as owners, or as agents for the owners, any lithofracteur; and they say the only intervention in which they have been concerned or taken part in relation to lithofracteur since April, 1877, has been the acting as "Custom House agents" in reference to obtaining on behalf of Messrs. *Krebs & Co.*, of *Cologne*, the real owners of such lithofracteur, permission for the discharge thereof from the ships into lighters; and then they describe their duties as Custom House agents in the way that has been stated.

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(1) Law Rep. 3 Ch. 438.
(2) Law Rep. 3 Ch. 439.
(3) 21 L. J. (Ch.) 76.

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I must say that I consider it at least remarkable that this phrase of "Custom House agents" appears for the first time in the amended defence. The Plaintiffs had endeavoured in the usual manner to procure from the Defendants such discovery as they were entitled to. The Defendants denied that they had since April, 1877, brought any lithofracteur to, or kept it afloat in, English waters. In answer to the Plaintiffs' interrogatories, they admitted that they had purchased from *Krebs & Co.* quantities of lithofracteur; but they declined to give any particulars. In the Defendants' affidavit of documents, they admitted that they had in their possession various books of account relating to their dealings in lithofracteur; but they said that these books had been transmitted to *Australia;* the Plaintiffs have been before unable to procure access to those books. Mr. *Jones,* the only one of the Defendants who was in this country when the action was brought, went to *Australia* a few weeks ago in consequence of the dangerous illness of his partner, then the other Defendant. The Plaintiff has had no opportunity of examining him; nor has Mr. *Jones* thought fit to give evidence on his own behalf. The Plaintiff was driven, under those circumstances, to the dangerous experiment of examining Mr. *Meyer,* the Defendant's clerk, undoubtedly a hostile witness, who, being afterwards examined on the part of the Defendant, repeated what he had before stated as to his application to the Custom House, and the manner in which he procured the delivery of the goods; in all which he said he acted, not as the importer, but on behalf of *Krebs & Co.* He stated also that he knew that the Defendants had no interest in the goods; that they received no payment in respect of the transactions, but only the reimbursement of the charges he had paid to the Custom House officers. In this latter statement he was confirmed by a Mr. *Seyd,* who was the manager of the business then carried on by *Krebs & Co.* in *London,* and which has since been discontinued. But neither of them explained why the Defendants or their clerk should be employed to do that which *Krebs'* manager might have done; nor whether the bills of lading were indorsed and placed in the hands of the Defendants; nor why they were represented at the Custom House as being the importers, in written documents signed by the Defendant *Jones.* Nor can I adopt the statement

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that the Defendants, who are merchants, should upon this particular occasion call themselves Custom House agents, a business which appears to me to be of a totally different character from that of merchants, and never, as far as I can gather from the evidence, assumed or carried on by the Defendants on any other occasion. Nor am I satisfied by the mere assertion of Mr. *Meyer*, that he knows the Defendants had no interest in the importation. Such an interest, if any such there was, must have been created by and between *Krebs & Co.* The Defendants might prove the fact; but although I by no means conclude that any such interest did exist, I cannot think that the contrary is proved by the clerk, whose assertion amounts to no more than that he does not know of it.

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Assuming that all Mr. *Meyer* and the other witnesses have said to be true, I cannot resist the written and other evidence, by which the facts are established, that upon the three several occasions the Defendants did procure the delivery and transhipment of the goods mentioned; nor can I doubt that such dealing was a user by the Defendants in infringement of the Plaintiffs' rights under the patent. Even if the intervention of the Defendants was just that which it is said by the Defendants to have been, merely benevolent and gratuitous, and in the character of Custom House agents (a part in which they appeared for the first time)—I cannot consider that the Defendants have thereby relieved themselves of all liability. For it is beyond doubt that the Defendants knew of the rights claimed by the Plaintiffs under the patent; that they knew the nature of the invention, being, as they say they have been engaged in the business of shipping to *Australia*, and there selling the invention. And it appears to me to be also clear that the Plaintiffs have sustained loss by the unlawful introduction into this country through the instrumentality of the Defendants, of large quantities of lithofracteur, of the value of several thousands of pounds, the manufacture and sale of which commodity is the exclusive right of the Plaintiffs under the letters patent.

I take the law to be as laid down by the Vice-Chancellor *Wood* in *Betts* v. *De Vitre* (1): "This Court has always been in the habit of holding, that anybody who takes part in a wrong of this description, is liable to be restrained from committing the wrong, and is answerable." The decree of the Vice-Chancellor in that case having been affirmed on appeal, it is not necessary for me to advance reasons in support of so plain and just a principle of law; but I am tempted to add that, if this were not the law, it would be within the power of persons meaning to do wrong against the property of others, and being able to find friendly and gratuitous agents ready to assist them, to accomplish their purposes with impunity.

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(1) 11 Jur. (N.S.) 9, 11.

I think, therefore, that the Plaintiffs are entitled to an order restraining the Defendants, "their servants and agents, during the subsistence of the Plaintiffs' letters patent of the 7th of May, 1867, or any extension thereof, from manufacturing or selling a certain compound called lithofracteur, or any compound consisting of or containing nitro-glycerine absorbed in any porous unexplosive substance, or from transhipping, importing, or exporting, into or from any port of *Great Britain*, or from moving or attempting to move from any place to any other place any lithofracteur, or such other compound as aforesaid;" and that the Plaintiffs are also entitled to an inquiry as to the amount of damages they have sustained by the unlawful use which has been made in this country of their patent invention; the amount of which damage, when it shall be ascertained, the Defendants must be ordered to pay. The Defendants must also be ordered to pay the costs of the suit.

C. A. From this decision the Defendants appealed. The appeal was heard on the 27th of April, 1881.

Davey, Q.C., and *T. M. Goodeve*, for the Appellants:—

The only question now in dispute between us is whether the Defendants infringed the Plaintiffs' patent in May, 1877, when they assisted *Krebs & Co.* to pass some of the lithofracteur through the Custom House. The character in which they did the acts complained of is correctly stated in the statement of defence. They were neither vendors, purchasers, nor consignees of the article, but simply clerks acting for *Krebs & Co.* in passing it

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through the Custom House: a complicated business which none but persons accustomed to it can manage. The licenses required by the *Explosive Substances Act,* s. 40, sub-s. 9, were not in their hands, but were held by *Nursey, Krebs & Co.'s* usual agent. The entry in the Custom House form, "*F. H. Meyer,* clerk to the importers," was a mere formal entry in order to comply with the requirements of the Custom House, and cannot estop the Defendants from shewing who were in fact the owners of the article. If the Defendants are liable for infringement under these circumstances, every Custom House clerk and office-boy would be liable for performing his ministerial duties. There is no authority which carries the doctrine of the Courts as to infringement to such an extent as this: *Betts* v. *Neilson* (1); *Higgs* v. *Goodwin* (2); *Minter* v. *Williams* (3); *Adair* v. *Young* (4).

Aston, Q.C., and *E. Cutler,* for the Plaintiffs:—

We rely upon two principles which are now well established; first, that the importation into *England* of an article manufactured abroad, when the process of manufacture has been patented in *England,* is an infringement of the English patent: *Elmslie* v. *Boursier* (5); *Von Heyden* v. *Neustadt* (6). An English patentee is entitled by the form of his patent to have "the full benefit and sole use and exercise of the invention" (15 & 16 Vict. c. 83, Schedule), and every one who interferes with that right commits a wrongful act. Secondly, it is also established that every person who aids and abets in that wrongful act is liable to be stopped by this Court: *Betts* v. *De Vitre* (7). If the Defendants were mere agents they were still liable: *Upmann* v. *Elkan* (8); *Moet* v. *Couston* (9). It may not be always worth while to proceed against the agent, but he is always subject to an action. In this case we were obliged to proceed against the Defendants, because *Krebs & Co.* were beyond the jurisdiction. But the Defendants were not mere agents; there is evidence that they still had an interest in the lithofracteur under the agreement of 1873. They stated to the Custom House authorities that they were importers, and they cannot recede from that statement. They were actually themselves using the invention, for the explosive could not be transhipped or removed with safety unless it had been subjected to the Plaintiffs' process.

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(1) Law Rep. 3 Ch. 429; Ibid. 5 H. L. 1.
(2) E. B. & E. 529, 5 Jur N.S. 97
(3) 4 Ad. & E. 251.
(4) 12 Ch. D. 13.
(5) Law Rep. 9 Eq. 217.
(6) 14 Ch. D. 230.
(7) 11 Jur. (N.S.) 9, 11.
(8) Law Rep. 7 Ch. 130.
(9) 33 Beav. 578.

JAMES, L.J. :—

In this case the Plaintiffs complain of the Defendants, Messrs. *Jones, Scott, & Co.*, as having infringed letters patent which are now vested in the Plaintiffs, who are a limited company. The Defendants do not deny the right of the Plaintiffs to their letters patent, or in any way traverse the validity of them, but they simply deny the fact that they have in any way infringed those letters patent. That is their case. The Defendants, *Jones, Scott, & Co.*, some years ago, before the Plaintiffs' title as assignees of the patent had accrued at all, had been dealing in the article as purchasers from the German manufacturers, *Krebs & Co.*, with a view to exportation to *Australia.* That seems to have been the only thing that they had to do with it. They had an agreement with *Krebs & Co.* giving them an exclusive right to supply the Australian colonies, or some of them, and they had an agreement for purchasing for that purpose. However, they say that all these transactions of purchasing had come to an end before the Plaintiffs' title had accrued, and that with respect to what occurred since the title of the Plaintiffs had accrued the only intervention which the Defendants have made, or with or in which they have been concerned or taken part in relation to lithofracteur since the 23rd of April, 1877, has been in acting as Custom House agents in reference to obtaining, on behalf of Messrs. *Krebs & Co.*, the real owners of this lithofracteur, permission for the discharge thereof from ships into lighters. And they say in their defence—"As such Custom House agents the Defendants' function was confined to obtaining papers necessary for such transhipment, and they never had any ownership in or exercised any control over the said lithofracteur. The Defendants were in no sense the importers of the said lithofracteur, though in order to comply with the form in use at the Custom House they appear to have been so described

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in some of the papers sent in by them; but notwithstanding the use of the word, the real nature of the Defendants' employment was explained to and well understood by the Custom House officers." That is what they allege. It was for the Plaintiffs to prove, if they could prove—the burden being on the Plaintiffs—that the Defendants had been concerned, or taken part, or had intervened in respect of the cargoes in question in some other manner than that which the Defendants themselves alleged, because any person who says that the Defendants have committed a wrong against him must prove the wrong by ordinary legal evidence.

Now, the Plaintiffs really have given no evidence whatever in support of that contention. On the other hand, the Defendants have conclusively proved—that is to say, if the evidence is to be believed—every word of that allegation to be strictly and literally true. But it was suggested, and seems to have been suggested with some success in the Court below, that although the Plaintiffs themselves had not proved the affirmative, yet some of the affirmative was to be supposed to be proved, or was to be assumed to be proved, because the negative had not been in every possible respect satisfactorily established by the evidence on the part of the Defendants, especially because the Defendant, who was abroad in *Australia*, had not stayed here to give evidence himself. But really that is a fallacy which we have had occasion more than once to refer to in this Court, that a man supposes that he proves the affirmative because the witness for the negative is not wholly and entirely to be believed. Of course that is not so. The affirmative must be proved, and to say that a witness for the negative is not wholly to be believed, or that some other witness might be there, is in no sense of the word to prove the affirmative.

Then, what we have with regard to the facts of the case is this: As to what the Defendants did it appears to me they really have proved it in every respect most satisfactorily, and that there is no inference or suspicion whatever to be drawn from or raised by the fact that Mr. *Jones*, the Defendant, happened to be in *Australia*, and did not happen to be in Court to give evidence. What we do know is this, that *Krebs & Co.* manufactured these goods at *Cologne*; that they were consigned to *Krebs & Co.* by themselves—the bills of lading being made out to *Krebs & Co.* or assigns; that the ship was freighted by *Krebs & Co.;* that the freight was paid by *Krebs & Co.;* that when the goods arrived in the River *Thames* they were transferred from the ship to the lighter paid for by *Krebs & Co.*, and were transferred from that lighter into a warehouse which was *Krebs & Co.'s* warehouse, where they remain. It is true that in the course of the proceedings in the Custom House in obtaining the permission from the Custom House, the Defendants' clerk, which was the only point made by the Plaintiffs in the whole case, in filling in some documents, which had to be filled in in the course of obtaining a discharge order, or a warrant for discharge, from the ship, used expressions which seemed to shew that his masters, *Jones, Scott, & Co.*, were the importers. These documents were utterly immaterial for any purpose in this suit, except so far as they might have raised suspicion. Of course the fact that *Jones, Scott, & Co.* had inadvertently made that immaterial mistake in the document is not of any consequence, and is not an estoppel, it being shewn conclusively that *Jones, Scott, & Co.* never had any interest whatever in the lithofracteur in question, or any of those cargoes, and that they never had any possession, either as agents or otherwise, or any control or power or dominion over them. Although there were those documents, which were part of the transaction, the proper and essential documents, the leading documents in the case as far as *Jones, Scott, & Co.* were concerned, were letters written and signed by Mr. *Jones*, the partner, and addressed to the Custom House, in which it conclusively appeared that when they asked for the proper warrant or authority, or whatever it is called, from the Custom House, *Jones, Scott, & Co.* were not the importers, but that *Krebs & Co.* were the importers, and in fact the only persons who held the proper and necessary importers' license. The agent of *Krebs & Co.* appears to have been a person in this country named *Nursey* who was authorized to take these things under the particular provisions requiring a proper license or a proper authority to receive explosive compounds of this character. Then we have this established, and in point of fact established, to my mind, clearly, that the goods remained *Krebs & Co.'s* goods; that the Defendants really were not actually trading as Custom

House agents, but what they did was as agents on behalf of *Krebs & Co.* to obtain the warrant authorizing the delivery from the ship to the lighter. Those are the facts.

Then a question was raised by Mr. *Aston* very broadly, even assuming that to be the fact. He says: It may be all true that you only applied to the Custom House for the purpose of getting that authority, but that was one of the steps by which *Krebs & Co.* were about to infringe the Plaintiffs' patent, and you took part, therefore, in it and assisted *Krebs & Co.* Therefore, so far as you did, you obtained the warrant—they might have obtained it themselves, or by anybody else, but you did in fact obtain it from the Custom House—and therefore you lent yourselves in such a way as to enable *Krebs & Co.* to infringe the patent. Now, is that an actionable thing—is the mere assisting in getting the goods from the ship into a lighter an actionable wrong? What is actionable, and what the Plaintiffs' rights are, is shewn by the letters patent themselves. The rights of the patentee, which nobody can infringe, are that the patentee and his assigns, and no others, may during the term make, use, exercise, and vend his said invention. Can anybody say that going to the Custom House and writing to the Custom House for *Krebs & Co.* for a warrant to discharge things from a ship into a barge is making the invention? is it using it—is it exercising or vending it? It seems to me it is neither making, using, exercising, nor vending the said invention. *Krebs & Co.*, the persons who had the control over it, or the persons who had the possession, may, in one sense, be said to be using it; having regard, as Mr. *Aston* said, though I do not think it is necessary for us to determine the point, to the particular nature of the invention in this case, which was one by means of which every drop of the highly explosive thing nitro-glycerine is coated with some other material in such a way as to make it storeable, movable, and transportable with safety. Therefore, as the effect and utility of the patent, according to Mr. *Aston's* view—and he may be right in that—was the safety communicated to the nitro-glycerine by means of the particular invention, if *Krebs & Co.* were to bring the thing into this country for the purpose of sending it abroad, even without either opening the packages, if the packages were on board a ship or in a warehouse in *England*,

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and there stored *boná fide* with a view of being sent out of this country, it is possible that they might be held to be using it in this country nearly in the same sense as persons were held to be using *Betts' Patent Capsule*, because *Betts' Patent Capsule* was protecting the liquor in this country, which was the use of the invention. But a man who has no possession of the thing, and has no control over it, and who has no dominion or power to deal with it, to whom the safety or the want of safety is not of the slightest consequence, cannot be said to be using the invention; and that is the only way in which it could be said that these letters patent were infringed. And as of course nobody could pretend to say that he was making, exercising, or vending it, it does not come within either of those. It is not necessary to go through the prohibitory words, which do not carry it any further.

Therefore it appears to me that if an action had been brought against the Defendants, setting up the exact facts, and saying that *Krebs & Co.* imported into this country articles made in contravention of the letters patent, and you went to the Custom House, and got from the Custom House an authority enabling the captain of the ship who imported them to deliver them into *Krebs & Co.'s* lighter—if that action had been brought alleging those facts, I cannot but think myself that that would have been clearly demurrable, and nobody could suppose that there was in the mere act of assisting in procuring the transfer from one vessel to another vessel any infringement of the patent. It is said the Court of Chancery has gone further in dealing with agents, but I do not think it ever did. The Court of Chancery has always held a hand over agents, but then it appears to me they must be actually agents. They must be agents who are agents in the making, in the using, in the exercising, or in the vending of the invention. They must be actually agents whose agency is directly in the making, using, exercising, or vending. Or, in another case, there might be a person who had possession of the pirated article still as agent, consignee, or factor, or in any other capacity, which possession the present High Court, formerly the Court of Chancery, could prevent being used in any way to the damage or injury of the patentee. But then it must be that kind of agency, and that is the kind of agency which we are asked to extend to this case. It appears to me that if we call a man an agent for this purpose, it would be saying that any person whatever who had anything to do with the removal of goods from a manufacturer's factory to the manufacturer's storehouse would be liable to an action, either for damages or to an injunction, because it turned out that those articles were made either in infringement or were going to be sold in infringement of the letters patent, or, which is the same thing, in infringement of a trade-mark. If it were to be said that any person who had anything to do, either directly or indirectly, with the means by which the goods got from one place to another was to be liable to an action at law or an injunction in a suit by the Plaintiffs, it would be giving a wide and most injurious encouragement to idle and vexatious litigation. According to my view it would be interfering, without any real benefit to any human being, with the ordinary course of men's lives in the prosecution of their trades and vocations. I am of opinion that there is no authority for such an extension of the rule, and none of the cases have gone beyond, as I said, a direct agency in the possession of the thing itself. I think we should be doing very wrong indeed if we were to encourage the extension of that to persons who really had nothing whatever to do with the infringement. In my opinion, therefore, the order of the Vice-Chancellor ought to be discharged, and the action ought to be dismissed, and with costs.

Baggallay, L.J.:—

I am of the same opinion, and for the same reasons. I have but a very few words to add, and they have reference rather more to to the facts of the case than to the application of the law to those facts.

This lithofracteur having been manufactured at *Cologne* was shipped from a Dutch port for delivery at a warehouse on the River *Thames*. The permission or the consent of three authorities was required for that purpose. Inasmuch as the article was a foreign article, the laws or the rules of the Custom House had to be obeyed. It had to be ascertained whether there was any duty payable in respect of it, and, if duty was payable, whether it had been paid. Then, inasmuch as the article was an explosive

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material, they had to comply with the provisions of the Act with reference to explosive substances. Thirdly, they had also to obey, as the goods were to be delivered in the River *Thames*, the regulations of the *Thames* conservators. No question arises here with reference to those regulations. It must be assumed that they were fully complied with.

Now, the license for the landing of explosive articles had to be obtained from the Secretary of State, and the license was in favour of the importers, whoever those importers might be. All that the Custom House had to do with the matter was to ascertain, as I said just now, whether the goods were free from duty, or, if duty was payable, whether it had been paid, and therefore, before the goods could be landed from the ship in which they were imported to be taken on shore, there must be what is called a landing order or delivery order, which simply authorizes the landing of the goods. The license in this case for the landing of the explosive substance was in due course obtained by the importers. The transactions which we have to deal with were three in number—three several importations—but the circumstances of each were the same with one very slight exception. We may take the cargo brought by the *Edward Austin* as an example of all, and it has this advantage, that the *Edward Austin* brought over lithofracteur of which Messrs. *Krebs & Co.* were declared to be the importers, and it has also brought over detonators which were not the subject of the patent, but as to which Messrs. *Jones, Scott, & Co.* were themselves the importers. When they applied for the Custom House authority to land those goods they enclosed the licenses which had been granted under the *Explosives Act*, and those licenses were declared to be for *Jones, Scott, & Co.*, the Defendants, as regards the detonators, and for *Krebs & Co.* as regards the lithofracteur. In regard to each of the other two cargoes the licenses were issued to *Nursey*, who in each of those two cases was declared to be the importer. Therefore, you have got the authority under the *Explosives Act* in favour of the actual importer of the goods. Then what was it that *Jones, Scott, & Co.* did? They simply forwarded the license for the landing in pursuance of the provisions of the *Explosives Act* to the Commissioners, and asked them merely for their authority to clear the goods through the Custom House, and to hand in the proper delivery order which indicated that all the duty, if any duty was payable, had been paid and discharged. That was all that they did. I quite assent to the proposition, which Mr. *Aston* pressed very strongly upon us, and which was stated by my colleague, Lord Justice *James*, in the case of *Elmslie* v. *Boursier* (1), that any interfering with the exclusive right of a grantee of letters patent will be restrained, and if in this case these goods had ever been in the actual possession of Messrs. *Jones, Scott, & Co.*, there might have been, having regard to the peculiar nature of the subject-matter of the letters patent, a question (it is not necessary to express an opinion upon it) whether, by reason of their being in such possession, they were using the invention. But I am satisfied upon the evidence that the goods were never in the possession of Messrs. *Jones, Scott, & Co.* at all, but that they were delivered from the ship to the lighterman, which lighterman was employed by the manager in *England* of Messrs. *Krebs & Co.*

Therefore, it appears to me that there was no sufficient ground for making the decree which has been made in this case, and that the appeal ought to be allowed and the claim dismissed with costs.

LUSH, L.J.:—

My learned colleagues appear to me entirely to have exhausted the subject. Their judgments are the result of our joint deliberations, and I have nothing to add to them, but simply to say I adopt every word which has been said by my two learned colleagues.

Solicitors: *J. & R. Gole; Woodbridge & Sons.*

(1) Law Rep. 9 Eq. 217.

M. W.

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Onerous Property of Bankrupt—Lease—Disclaimer by Trustee—Effect on Rights and Liabilities of Third Parties—Construction of Statutes—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 23—*Bankruptcy Rules*, 1871, *r.* 28.

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A disclaimer by the trustee in a bankruptcy of a lease or other onerous property of the bankrupt operates as a surrender only so far as is necessary to relieve the bankrupt and his estate and the trustee from liability, and does not otherwise affect the rights or liabilities of third parties in relation to the property disclaimed.

If, for instance, the bankrupt has granted an underlease of property demised to him, a disclaimer of the original lease by his trustee in bankruptcy does not affect the right of the lessor to distrain on the property for the rent reserved by the original lease, and to re-enter for breach of the lessee's covenants in the lease, or for non-payment of the rent reserved thereby.

But, if the underlease is made at a rent less than the rent reserved by the original lease, the underlessee is, after the disclaimer, entitled to prove in the bankruptcy for the value of the difference between the two rents.

A statute may be construed contrary to its literal meaning, when a literal construction would result in an absurdity or inconsistency, and the words are susceptible of another construction which will carry out the manifest intention.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

On the 11th of August, 1879, *John Walton*, *William Walton*, and *Henry Walton*, trustees of the will of *William Walton*, deceased, executed a lease whereby they demised to *Hyam Levy* and *Moss Hyam Levy*, partners in trade, a house in *Whitechapel*, for the term of ten years from the 25th of December, 1878, at the annual rent of £70, and subject to the covenants therein contained. On the 29th of August, 1879, *Hyam Levy* and *Moss Hyam Levy* executed an underlease of the house, whereby, in consideration of £100 paid to them by *Herman Michaelson*, and of the rent and covenants thereinafter contained, they demised the house to *Michaelson* for the term of 9½ years (less seven days) from the 24th of June, 1879, at the annual rent of £55. By this deed *H. Levy* and *M. H. Levy* entered into the ordinary covenant with *Michaelson* for the quiet enjoyment by him of the demised premises during the term thereby granted, but they entered into no other covenant.

On the 17th of January, 1881, *H. Levy* and *M. H. Levy* filed a liquidation petition, under which trustees of their property were appointed. On the 8th of April, 1881, the trustees applied to the Court for leave to disclaim the original lease. Notice of this application was served on the Messrs. *Walton* and on *Michaelson*. The Registrar gave the leave to disclaim without any condition. Messrs. *Walton* appealed.

John Henderson, for the Appellants:—

Leave to disclaim the lease ought not to be given without imposing some terms. Sect. 23 of the *Bankruptcy Act*, 1869 (1), provides in effect that the disclaimer is to have the same operation as an actual surrender of the lease, but rule 28 of the Bankruptcy

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(1) Sect. 23: "When any property of the bankrupt acquired by the trustee under this Act consists of land of any tenure burdened with onerous covenants, of unmarketable shares in companies, of unprofitable contracts, or of any other property that is unsaleable or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding he has endeavoured to sell, or has taken possession of such property or exercised any act of ownership in relation thereto, may, by writing under his hand, disclaim such property, and, upon the execution of such disclaimer, the property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication, and if the same is a lease be deemed to have been surrendered on the same date, and if the same be shares in any company be deemed to be forfeited from that date, and if any other species of property it shall revert to the person entitled on the determination of the estate or interest of the bankrupt, but if there shall be no person in existence so entitled, then in no case shall any estate or interest therein remain in the bankrupt. Any person interested in any disclaimed property may apply to the Court, and the Court may, upon such application, order possession of the disclaimed property to be delivered up to him, or make such other order as to the possession thereof as may be just.

"Any person injured by the operation of this section shall be deemed a creditor of the bankrupt to the extent of such injury, and may accordingly prove the same as a debt under the bankruptcy."

Rule 28 of 1871: "Where any property of a bankrupt acquired by a trustee under the *Bankruptcy Act*, 1869, shall consist of a leasehold interest, the trustee shall not execute a disclaimer of the same without the leave of the Court being first obtained for that purpose; and upon any application to the Court for such leave, notice of the desire of the trustee to disclaim such interest shall be given to such person or persons as the Court shall direct, and such order shall be made thereon as the Court shall think fit."

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Rules, 1871, requires the trustee before disclaiming a lease to obtain the leave of the Court, and enables the Court to impose terms.

If the lease was actually surrendered, the underlessee would, by 8 & 9 Vict. c. 106, s. 9, be brought into direct relation with the original lessor, who would thus obtain the benefit of the underlessee's covenants. But the original lessor would get a rent of only £55 instead of the rent of £70 reserved by the original lease. A lessee of a term of 100 years might grant an underlease in consideration of a large premium, receiving only a peppercorn rent, and then, if the lessee became bankrupt, and his trustee was allowed to disclaim the lease unconditionally, the original lessor would be practically disseised of his property. He could not eject the underlessee: *Smalley* v. *Hardinge*, recently before the Court of Appeal (1).

[JAMES, L.J., referred to *Ex parte Buxton* (2).

JESSEL, M.R.:—Rule 28 does not extend to a contract. A building contract might be pledged as security for an advance of money to a builder. The contract might not be worth more than the money advanced upon it. Could the trustee in bankruptcy of the builder disclaim the contract and leave the lender of the money without any security? Must not the words of the section be limited by the intent?]

At any rate, rule 28 applies to a lease, and in *O'Farrell* v. *Stephenson* (3), in the Court of Appeal in *Ireland*, it was suggested by Lord Justice *Fitzgibbon* that the word "surrender" may be read in a restricted sense, so as to confine the statute "to the liberation of the bankrupt and his estate from liability," and that "the rights and interests of third persons may be left untouched, save so far as they are necessarily affected by the impecuniosity of the bankrupt." We want to preserve our right to distrain for the original rent. We have offered not to prove against the estate of the bankrupt, and to undertake not to sue the trustee on the covenants in the lease. If any one is to suffer by the disclaimer it should be the underlessee, who might have inquired into his lessor's title: *Wilson* v. *Hart* (4).

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(1) Not yet reported.

(2) 15 Ch. D. 289.

(3) 4 Ir. L. R. 715, 727.

(4) Law Rep. 1 Ch. 463.

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Winslow, Q.C., and *Finlay Knight*, for the trustee:—

No doubt the object of the section was only to relieve the trustee in bankruptcy from personal liability; for all other purposes a disclaimed lease might well be held to be still in existence. An actual surrender of a lease by the lessee to the lessor does not affect the rights of third parties: *London and Westminster Loan, &c., Company* v. *Drake* (1).

[JAMES, L.J.:—That rule is for the benefit of a third party, not for that of the surrenderer or surrenderee. How could a lessor who had voluntarily accepted a surrender of a lease say that any rights under it could remain to him after the surrender?]

It is laid down by *Coke* (2), "But having regard to strangers, who were not parties or privies thereunto, lest by a voluntary surrender they may receive prejudice touching any right or interest they had before the surrender, the estate surrendered hath in consideration of law a continuance."

[JESSEL, M.R.:—That is as regards persons who were not parties to the surrender.]

If the rights of a third party are by intendment of law kept alive after the surrender as against the lessor, the rights of the lessor must equally be kept alive as against the third party.

As to the case suggested of a building contract having been pledged for advances to the builder, the trustee in bankruptcy would not be personally liable on such a contract if he did not disclaim it, nor would the bankrupt's estate become liable: *Ex parte Davis* (3). If the trustee were to disclaim the contract, the result would be that a proof could be made for the whole amount of the advances against the bankrupt's estate. The trustee could not thus damnify the estate.

[JESSEL, M.R.:—Suppose there were a mere charge, without any debt or liability, like a charge for portions?

JAMES, L.J.:—Suppose a lessee assigned his lease and then the assignee became bankrupt, and his trustee disclaimed the lease; 22 Ch D 19

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(1) 6 C. B. (N.S.) 798. 5 Jur N.S. 407 (2) Co. Litt. 338, b.
(3) 3 Ch. D. 463.

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what would be the effect upon the obligation of the lessee on his covenants?]

It would not affect the liability of the original lessee: *Smyth* v. *North* (1).

Methold, for the underlessee.

JESSEL, M.R.:—

This appeal raises a very important question with regard to the proper construction of sect. 23 of the *Bankruptcy Act*, 1869. Before considering the exact words of the section I should like to say a word or two as to the rules which are binding on all Courts in regard to the construction of statutes as well as of all other instruments. Whatever may have been the case in times past, in modern times those rules have become perfectly well settled. They have become much more limited as regards the power of the Courts, and at the same time so well recognised as to be binding on this Court and all other Courts. To shew what those rules are I will cite from the last case on the subject in the House of Lords, *Caledonian Railway Company* v. *North British Railway Company* (2), which was decided in February, 1881; consequently it is not only the last decision, but a very recent case. It was an appeal from the Court of Session in *Scotland*, but it is an authority in *England*, the rules on this subject being the same in *Scotland* as in *England*. The Appellant there contended that the literal construction ought to be given to a section of an Act of Parliament, though it appeared that that construction would defeat the object of the Act as shewn by the preamble. That contention, however, did not prevail. And Lord *Selborne* laid down the rule of construction in these words (3): "The more literal construction ought not to prevail, if (as the Court below has thought) it is opposed to the intentions of the Legislature, as apparent by the statute; and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated." And in the same case (4) Lord *Blackburn*

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(1) Law Rep. 7 Ex. 242.

(2) 6 App. Cas. 114.

(3) 6 App. Cas. 122.

(4) Ibid. 131.

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quoted with approval that which Lord *Wensleydale* called the golden rule for construing all written engagements, and which he stated thus in *Grey* v. *Pearson* (1): "I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the Courts of Law in *Westminster Hall*, that in construing wills, and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further." Having these rules before us, I will now proceed to consider the object of the *Bankruptcy Act* so far as it is dealt with by sect. 23, and then I will consider whether a literal construction of the words would be absurd or inconsistent with the object of the Act. The object of the Legislature is plain. When a man becomes bankrupt he is not to remain liable to engagements attaching to his property when that property is taken away from him; the Legislature intended to set him free from personal obligations attaching to his property. That was one object of the section. Another object was this, that all his property should be vested in his trustee, and no one would accept the office of a trustee in bankruptcy if he was to become personally liable for all the obligations accompanying the property of the bankrupt which was vested in him on his appointment. Those who framed the Act must have been well acquainted with the term "covenant running with the land," and must have been aware that liabilities arise from the mere holding of property in certain cases, as for instance, in the case of a lease for years. It was manifestly the intention of the Legislature that the trustee should not be compelled to acquire the bankrupt's property subject to such liabilities, and accordingly provision is made that, when he finds that the property will not produce a surplus beyond the value of the liability affecting it, he may be able to disclaim it, and so get rid of the property and the liability together. Of course he is not to keep the property and at the same time to get rid of the liability. This was the object of the Legislature, and I conceive that it was

(1) 6 H. L. C. 61, 106. 3 Jur NS 823. 831

their only object; it never could have been their intention to confiscate the property of any man without urgent reason for doing so. A construction of the section which would lead to such a result might well be, to use the words of Lord *Wensleydale*, described as an absurdity. Having made these observations, I will proceed to consider the words of sect. 23. It speaks first of "land of any tenure burdened with onerous covenants." These words apply to ordinary leaseholds, but they will also include the freeholds subject to a perpetual rent-charge which are common in the north of *England*. Then the section speaks of "unmarketable shares in companies." This must mean shares from which the trustee can obtain no profit. Holders of shares are generally burdened with a liability to pay calls, to a limited or unlimited extent according to the nature of the company. Then come the words "unprofitable contracts." These words are of general application, but they must mean contracts which are unprofitable as regards the bankrupt's estate, and which if adopted by the trustee would involve him in some liability. Then come the words "any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money." In all these cases it is provided that the trustee may by writing under his hand disclaim such property, and upon the execution of the disclaimer "the property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication." Take the case, which I suggested during the argument, of a contract by a builder to build houses on another man's land, the landowner agreeing that on the completion of the houses he will grant leases of them to the builder—a mere contract. The contract is pledged by the builder as security for his own debt or the debt of some other person, and afterwards the builder becomes a bankrupt. Is it to be supposed that the Legislature ever contemplated that the equitable assignee of the contract should lose his security by the act of the trustee of the builder in disclaiming the contract? But that would be the result of a literal construction of the words. I have known cases where many thousands of pounds have been lent to a builder on the security of a pledge of such a contract, and the builder afterwards speculated and became a bankrupt;

could it be called anything but absurd that, because the builder became a bankrupt, the man who had advanced the money to him should lose it? The same thing would apply to the case of a contract to build a ship. It is quite plain that if the trustee can by his disclaimer destroy the rights of third parties, there will be confiscation without any reason for it, except to benefit the person who would thus, by the mere accident of bankruptcy, get the property. The section goes on to say that if the property disclaimed is a lease it shall be deemed to have been surrendered on the same date. If a lease had been mortgaged by deposit and the lessee became bankrupt, it would be a strange thing that the equitable mortgagee should lose his money because the bankrupt's trustee disclaimed the lease. And, if there had been a legal mortgage of the lease by way of underlease at a peppercorn rent, if sect. 23 is construed literally, the lessor would by the disclaimer practically lose his property for the benefit of the mortgagee, who would not only get his mortgage money, but would be able to keep the property free from the obligation of paying any rent for it. The results of a literal construction of the section would be so monstrous that such a construction must be considered absurd. Then the section provides that if shares are disclaimed they shall be deemed to have been forfeited from the date of the adjudication. Shares may be very valuable, but they may be worth nothing to the trustee, because the bankrupt has pledged them for a sum greater than their value. Could it have been intended that, because the shareholder became a bankrupt, his trustee should be able to disclaim the shares, and thus work a forfeiture for the benefit of the company? This would be manifestly absurd. Then the first clause of the section ends by providing that if any other species of property be disclaimed, "it shall revert to the person entitled on the determination of the estate or interest of the bankrupt." These words would apply to the case of a freehold vested in the bankrupt, subject to the payment of a fee farm rent. Probably, in such a case, as there would be no reversion, the property would devolve on the Crown. I have gone through the section in detail in order to shew the absurdity of the results which would follow from a literal construction of its words. But the next clause of the section, which enables any person interested

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in any disclaimed property to apply to the Court, and empowers the Court upon such application to "order possession of the disclaimed property to be delivered up to him," or "to make such other order as to the possession thereof as may be just," seems at first sight to shew that the Legislature was dealing only with property over which the Court of Bankruptcy had power, property of which it could dispose. The words are not very apt as regards property consisting of contracts. It is clear, however, that the power of disclaimer cannot be restricted to cases where actual possession of the property can be given by the Court. If the bankrupt had made an underlease of property of which he was lessee, the Court of Bankruptcy could not take away the possession of the property from the underlessee; and yet the trustee must have power to disclaim the bankrupt's leasehold interest; the second clause cannot control the former one. Therefore it seems to me that the section must be read as meaning that the property is to be disclaimed *inter se*, so as not to interfere with the rights of third parties, and only for the benefit of the bankrupt and his estate; so far, that is, as respects any rights and liabilities in relation to it as between the trustee and the person who is entitled to the benefit of those obligations which attach to the property; so far only as is necessary in order to relieve the bankrupt and his estate and the trustee from liability. The general words of the section are to be limited to the relief, on the one hand, of the bankrupt, his trustee and his estate from liability, and on the other hand, to the protection of the person whose direct rights against the bankrupt are affected by the disclaimer, by giving him a right to prove against the bankrupt's estate for the amount of the injury. In accordance with this principle, it appears to me that the disclaimer has been properly allowed in the present case, and that it will not affect the right of the lessors to distrain upon the property for the rent reserved by the original lease, or to re-enter for breach of the covenants contained in it.

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JAMES, L.J.:—

I have arrived at the same conclusion. When the case was first mentioned to us a fortnight ago I was startled at the consequences which would result from a literal construction of the section.

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By the law of *England* a lessor has a double right, a right *in personam* on the contract, a right *in rem* by distress on the property demised, and by the power of re-entry for nonpayment of rent or breach of covenant.

When the lessee makes a sub-demise, the sub-tenant is not liable on the contract, but he takes the property subject to all the lessor's rights *in rem.* And it would be very unjust and unreasonable if a lessee, who takes the property subject to liabilities, could, by any arrangement whatever with a third person, derogate from the lessor's rights. Of course, the lessee may enter into any contract he pleases with his sub-lessee, by which he (the lessee) expressly or impliedly undertakes to discharge the obligations of his own lease. But it would be a violation of every principle of law and justice, and against all common sense, to permit two men, by bargaining with one another, to affect any right of property whatever in another man, particularly any right of the owner from whom both derive title, the first immediately, the second mediately. And, although, for want of privity, no action of covenant lies against the sub-lessee, yet equity always prevents the sub-lessee from any active violation of the stipulations contained in the original lease. And it would seem to be equally against principle and against common honesty, that a lessee, by becoming bankrupt, should deprive the lessor of his remedies *in rem,* or release a sub-lessee from the legal liabilities and obligations to which the property was in his hands liable before the bankruptcy. If the lessee were insolvent, but not made bankrupt—if the lessee had died insolvent, the lessor's remedies as against the estate itself, and the sub-lessee's liability to distress and forfeiture would remain. Is it possible to conceive that an insolvency resulting in bankruptcy should confiscate the lessor's right, and give the sub-lessee an absolute immunity from such distress and forfeiture? The object of the bankruptcy laws was merely to regulate the distribution of the bankrupt's assets between his creditors, and to relieve the bankrupt and his estate from future liability to his creditors. But it was never intended to affect rights and liabilities as between the creditor and a third party. A surety, for instance, is not discharged by the bankruptcy of his principal.

But to revert to the position of lessor and lessee. Take the

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case of a lease with a surety for the payment of rent. Could it ever have been intended that the bankruptcy of the lessee was to release the surety? Take the case of a lease to two as joint tenants with the usual joint and several covenants. One of them becomes bankrupt. Can the disclaimer of his trustee release the other joint tenant from his liability? It has been held that a disclaimer does not destroy the interest of a sub-lessee. But supposing that instead of there being a sub-lease there had been a charge created by way of equitable mortgage, a rent-charge or otherwise, is it possible that the trustee could surrender so as to destroy that charge? Possibly these considerations, and a great many more which could be suggested, might lead to the conclusion that, when the statute says that the disclaimer shall operate as a surrender, there must be an implied condition that the trustee had in himself full right to surrender, not the lease, but the thing —the property—freed and discharged from all estates and interests, and that the rule, which requires the assent of the Court to any disclaimer, is obligatory on the trustee, and that the Court ought not to give such assent, unless satisfied that it can do so without injustice to the lessor, or to any one else, and without prejudice to any rights or remedies of or against any third person. But, seeing that that would not give the trustee the immunity it is intended that he should have, the more complete and satisfactory solution of the riddle may be found in the following principle. When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to. Now, the bankruptcy law is a special law, having for its object the distribution of an insolvent's assets equitably amongst his creditors and persons to whom he is under liability, and, upon this *cessio bonorum*, to release him under certain conditions from future liability in respect of his debts and obligations. That being the sole object of the statute, it appears to me to be legitimate to say, that, when the statute says that a lease, which was never surrendered in fact (a true surrender requiring the consent of both parties, the one giving up and the other taking), is to be deemed to have been surrendered, it must be understood as saying so with

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the following qualification, which is absolutely necessary to prevent the most grievous injustice, and the most revolting absurdity, "shall, as between the lessor on the one hand, and the bankrupt, his trustee and estate, on the other hand, be deemed to have been surrendered."

LUSH, L.J.:—

I have felt very great difficulty in coming to a satisfactory conclusion as to the construction of sect. 23. I have thought of it a great deal, and I have ultimately arrived at the same conclusion as my learned Brethren—that we must qualify the generality of the words in order to carry out the object. It seems to me impossible to construe the section literally without defeating its object and creating a manifest absurdity. The obvious intention of the Act was to free the bankrupt from future liability, and the object of this section was to free his estate from burdensome covenants, unmarketable shares in companies, unprofitable contracts,—property which could be of no benefit to his estate, and which, if the trustee could not get rid of it, would be a standing burden on the estate. As it was not the object of the Legislature to do more than this, in order to prevent absurdity we must read the word "surrendered" in a qualified sense. The section authorizes a trustee to disclaim a burdensome lease of the bankrupt, and if he does disclaim it, the lease is "to be deemed to have been surrendered on the date of the order of adjudication." If the lease had been actually surrendered, the lessor would have been deprived of all his rights under it. But the object was to place the trustee in the same position as if the lease had never vested in him, and that is all which is necessary to carry out the intention of the Legislature. Any qualifying words, therefore, which are necessary thus to restrict the operation of the section may be inserted. The object was only to relieve the bankrupt's estate and the trustee from liability, and it was not intended to affect the rights or liabilities of other persons further than was necessary to effect that object. I was at first disposed to think that the section would not apply at all to a lease when an underlease had been made by the bankrupt, because in such a case the Court cannot order possession of the demised property to be given

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up to the lessor. But, upon consideration, I think that the clause which enables the Court to make an order for the delivery up of possession must also be qualified, and that it applies only to a case in which the Court is able to give up possession of the property. When the possession of the property is in the trustee himself, he must give it up to the lessor. This, in my opinion, is the right construction of the section, and it carries out the object of the Act by enabling the trustee to get rid of burdensome property, and to give up possession of it when he is in a position to do so. I believe this is the first time the precise point has come before the Court for decision. In the case of a lease, rule 28 provides that the trustee, before disclaiming, must apply to the Court for leave to do so, and the Court can summon all the persons interested before it. I think the object of that provision was that the Court might see that the trustee did not waste property which might be of value to the estate. In *Smalley* v. *Hardinge* the question of the effect of a disclaimer of a lease came before us in another form, and the point which has been now raised was not then present to our minds. There the trustee of a bankrupt had disclaimed a lease, and the lessor thought that he was entitled to get possession of the demised property, though the bankrupt had granted an underlease of it. Mr. Justice *Mathew* held that the lessor was entitled to eject the underlessee, but we decided that he was not. The point was whether the disclaimer of the trustee had the effect of destroying the property of the underlessee, and no doubt some expressions may be found in our judgments treating the disclaimer as having the same effect as an actual surrender of the lease. But the point which has now arisen was not then present to our minds at all. Now, however, that it has arisen, we should still decide *Smalley* v. *Hardinge* in the same way as we did then.

JESSEL, M.R.:—

As regards the costs of the appeal, the Appellant not succeeding, of course cannot get any costs. But he could not safely have abstained from taking the opinion of this Court, and therefore we cannot order him to pay any costs. It is to be deplored that such important questions of law should have to be settled at the expense of the litigants, but there is no other fund for the payment of the costs.

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Methold:—The underlessee is entitled to prove against the estate for the difference in value between the rent of £55, which was reserved by the underlease, and the rent of £70 which he will now have to pay.

JESSEL, M.R.:—Yes, he has a right to prove for that.

The order dismissing the appeal was prefaced with a declaration of the opinion of the Court "that the disclaimer by the trustees will not affect the right of the lessors to recover the rent reserved by and enforce the covenants contained in the original lease by distress or entry."

Solicitors for Lessors: *Henderson & Buckle.*
Solicitor for Trustee: *H. Montagu.*
Solicitors for Underlessee: *Baddeley & Sons.*

W. L. C.

Ex parte EAST AND WEST INDIA DOCK COMPANY. *In re* CLARKE.

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June 30.

Leasehold Property of Bankrupt—Disclaimer by Trustee—Leave of Court—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 23—*Bankruptcy Rules*, 1871, *r.* 28.

In determining whether leave should be given to a trustee in bankruptcy to disclaim a leasehold interest of the bankrupt, the Court ought to have regard only to the question whether the disclaimer will be for the benefit of the persons interested in the administration of the bankrupt's estate, and ought not to have regard to any collateral consideration, such as the injury which the disclaimer might occasion to third parties.

Leave to appeal to the House of Lords refused, on the ground that the appeal would be from the discretion of the Court.

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284-292
22 ChD 19

THIS was an appeal from a decision of Mr. Registrar *Murray*, acting as Chief Judge in Bankruptcy.

On the 2nd of December, 1875, the *East and West India Dock Company* demised a public-house called the *Brunswick Tap*, at

laimer by trustee held not to affect remedies of
n against original lessee. East & West India Dock
pany. Hole 22 ChD 14. VCH. Ca

Blackwall, to *Arthur Hill*, for a term of twenty-one years from the 25th of March, 1875, at an annual rent of £300, and subject to the observance and performance of the covenants on the lessee's part contained in the lease. On the same day, *Hill*, in consideration of £1150 paid to him by *Robert Clarke*, assigned the premises to him for the remainder of the term, and by the deed of assignment *Clarke* covenanted with *Hill* in the usual form to pay the rent reserved by the lease, and to observe and perform the lessee's covenants therein contained, and to indemnify *Hill* against the payment of the rent and the observance and performance of the covenants. On the 3rd of December, 1875, *Clarke* demised the premises to Messrs. *Truman, Hanbury & Co.*, brewers, for the residue of the term of twenty-one years, except the last three days thereof, by way of mortgage to secure the repayment of £1000 advanced by them to him. On the 10th of February, 1881, *Clarke* filed a liquidation petition. On the 12th of March, 1881, *Hill* gave notice to the trustee requiring him to decide whether he would disclaim the property comprised in the lease by the *Dock Company* to *Hill*. The trustee then applied to the Court for leave to disclaim the debtor's interest in the lease, on the ground that the property was not worth the rent. Notice of the application was served on *Hill*, on the mortgagees, and on the *Dock Company*. The *Dock Company* opposed the application, on the ground that the effect of the disclaimer would be to destroy the lease, and to deprive them of their remedies against *Hill* upon his covenants. But they offered to undertake not to sue the trustee on the covenants, and not to make any claim in respect of them on the debtor's estate. The mortgagees opposed the application, upon the ground that the disclaimer would destroy their underlease. The Registrar was of opinion, upon the authority of *Smyth* v. *North* (1), that the disclaimer would not affect the rights of the *Dock Company* under the lease against *Hill*, and, on the authority of *Smalley* v. *Hardinge*, recently before the Court of Appeal (2), that the disclaimer would not affect the security of the mortgagees. And he gave leave to the trustee to disclaim the debtor's interest in the lease.

The *Dock Company* appealed.

(1) Law Rep. 7 Ex. 242.

(2) Not yet reported.

Kekewich, Q.C., and *W. Latham*, for the Appellants:—

Notwithstanding the recent decision of the Court in *Ex parte Walton* (1), it is doubtful whether the disclaimer of the lease by the trustee would not put an end to our rights under it against *Hill*, the original lessee. In *Ex parte Walton* there had been an underlease, not an assignment of the lease.

[Baggallay, L.J., referred to *O'Farrell* v. *Stephenson* (2).]

Smalley v. *Hardinge* shews that the disclaimer will not prejudice the mortgagees. If our offer is accepted, the property will cease to be onerous, and there will be no reason for allowing a disclaimer. The trustee will get all the benefit of a disclaimer. We are willing to have an undertaking in accordance with our offer inserted in the order.

[Baggallay, L.J. :—Are you prepared to indemnify the debtor's estate against any proof by the original lessee under the debtor's covenant for indemnity ?]

The right to prove under that covenant would be an immediate right of proof once for all. The judgment of Lord Justice *James* in *Ex parte Walton* shews that the object of the Act was to protect the bankrupt from future liability ; it was not the object to guard against a present right of proof by a surety, for instance.

[Lord Selborne, L.C. :—Have we any jurisdiction to do anything but decide whether leave to disclaim should be given ? Can we decide now what the effect of the disclaimer may be ?]

The Court frequently makes a declaration shewing the ground of its decision. In *Ex parte Walton* the order was prefaced with a declaration of the opinion of the Court that the rights of the lessor against the underlessee would not be affected by the disclaimer.

[Lord Selborne, L.C. :—Would such an expression of opinion be regarded in any other Court as a decision of the law ? And, if not, would it be proper for us to express an opinion ?]

Questions of will construction are often decided on demurrer.

[Lord Selborne, L.C. :—But there the Court has full jurisdiction to construe.]

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(1) *Ante*, p. 746.

(2) 4 Ir. L. R. 715.

It would be an opinion upon a matter entirely within the cognizance of the Court.

[LORD SELBORNE, L.C. :—But upon a question arising between two persons outside the bankruptcy.]

Both the persons are before the Court.

[*Cookson*, Q.C., for *Hill*:—I am not here for that purpose.]

Sect. 72 of the Act of 1869 gives the Court a very wide power to decide all questions " arising in any case of bankruptcy coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case." It is expedient to decide the present question when all the parties interested are before the Court. The precise point arose in *Smyth* v. *North* (1), and the majority of the Court (though Baron *Bramwell* dissented) were of opinion that a disclaimer by the trustee in bankruptcy of the assignee of a lease did not affect the rights of the lessor against the original lessee.

[BAGGALLAY, L.J. :—The actual decision was confined to rent which accrued due between the adjudication and the disclaimer.

LORD SELBORNE, L.C. :—The effect of the judgments of *Martin* and *Pigott*, BB., and of that of *James*, L.J., in *Ex parte Walton* (2), seems to be that the disclaimer is not equivalent to a real surrender of the lease, but that the legal estate remains in the bankrupt free from all liability.]

All the cases hitherto decided in the Court of Bankruptcy have dealt with interests carved out of the bankrupt's leasehold estate, not with the case of the bankrupt being the absolute assignee of the lease. We cannot safely act without the direction of the Court. In both the cases put by Lord Justice *James* as illustrations, in his judgment in *Ex parte Walton*, there would be a right of proof over against the bankrupt's estate, and the Lord Justice clearly contemplated only that the estate was to be released from future liability, not from a present right of proof.

[BAGGALLAY, L.J. :—Sect. 23 provides that any person injured by its operation shall have a right to prove for the injury against the bankrupt's estate. Your argument is that the fact that there would be an injury is a reason for refusing leave to disclaim. Would not that amount to a repeal of the section ?]

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(1) Law Rep. 7 Ex. 242.

(2) *Ante*, p. 746.

It would not be just for the Court to consider only the interest of the bankrupt's estate. In *In re Wilson* (1) the Chief Judge refused leave to disclaim a lease on the ground that the disclaimer would affect the rights of third parties. Rule 28 of the Bankruptcy Rules, 1871, which requires the trustee not to disclaim a lease without the leave of the Court, is not *ultrà vires;* it is authorized by the power to make rules which is conferred by sect. 78 of the Act. The Court has a judicial discretion, and it will have regard to all the circumstances, and endeavour to do equity to all the persons interested.

[Lord Selborne, L.C. :—The effect of the order of the Chief Judge in *In re Wilson* was to relieve the bankrupt's estate from all liability, and therefore the object of the statute was effected. That would not be so in the present case, if leave to disclaim the lease was refused.]

The liability of the bankrupt's estate or of the trustee to indemnify *Hill* could be made the subject of an immediate proof under sect. 31. There is indeed strong ground for saying that sect. 23 does not apply at all to a lease of which a bankrupt is only an assignee. The section applies only to onerous property, and the covenants entered into by an assignee with his assignor do not run with the land. The liability on those covenants will not be affected by the disclaimer, and either the disclaimer will not relieve the bankrupt's estate and the trustee from any liability, or, if it does, it will do so only by destroying rights which exist as between two persons outside the bankruptcy.

[Lord Selborne, L.C. :—Your argument must go to this extent, that in no case in which a bankrupt is the assignee of a lease ought leave to disclaim to be given.]

Not when the lessor offers to give the trustee all the immunity which he would obtain by a disclaimer. *Ex parte Buxton* (2) shews that the Court will regard the rights of third parties. The

(1) Law Rep. 13 Eq. 186.

(2) 15 Ch. D. 289.

proper order to make, if it were possible to make it, would be to revest the lease in *Hill: In re Mercer and Moore* (1).

Cookson, Q.C., and *McSwinney*, for *Hill*;

Herbert Reed, for the trustee; and

Gregory, for the mortgagees, were not heard.

Lord Selborne, L.C.:—

We do not think that the Registrar's order ought to be disturbed.

Rule 28, which undoubtedly calls upon the Court to exercise some judgment as to the propriety of allowing a disclaimer, appears to have been made only under the authority of the 78th section of the Act, which says that Rules of Court may be made "for the effectual execution of this Act and of the objects thereof, and the regulation of the practice and procedure of bankruptcy petitions and the proceedings thereon." Therefore that rule was evidently made, and indeed it only could be made, for the effectual execution of the 23rd section of the Act, and of the objects of that section. What were those objects? It appears to us that the object was to cut short by disclaimer all liability of the bankrupt's estate in the classes of cases which are there referred to, and which include beyond all question future liability under leases. The object was to cut it short by disclaimer, leaving any person who might be injured by the operation of the section to prove in the bankruptcy for whatever he could establish to be the value of the injury done to him. On the face of the section it appears to us that the power given by it is to be exercised with a view to the administration in bankruptcy of the bankrupt's estate, and for the benefit of all the persons interested in that administration. Therefore, if in a particular case it appears clear that, looking at that object alone, the disclaimer ought to be allowed, the Court would be introducing considerations foreign to the purpose of the Legislature if, for collateral reasons connected with the position of other persons, it should refuse to allow it, and thus leave on the bankrupt's estate a burden which under that section might be got rid of, and ought to be got rid of, if those collateral considerations did not prevail.

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(1) 14 Ch. D. 287.

Then we must consider how that applies to the present case. No suggestion has been made that there is any reason for not allowing the disclaimer, which has been allowed by the order under appeal, except the interest of the lessors as between themselves and (not the bankrupt's estate but) the person by whom the lease was assigned to the bankrupt; and the proposition really comes to this, that the Court ought never to allow a disclaimer under this section where the bankrupt is the assignee of a lease and the lessor is willing to offer such an undertaking as has now been offered to the Court.

Well, that is a startling proposition to be suggested as matter of law; and if we were to say that the Court is bound to exercise its discretion in that way, we should be laying down a law, not only not discoverable from the 23rd section, but, to my mind, very inconsistent with the policy which is expressed on the face of that section. For how would it work? The application is founded upon the apprehension that, notwithstanding the views of the effect of such a disclaimer which have been expressed by several learned Judges, by the majority of the Court of Exchequer in *Smyth* v. *North* (1), and by at least one most eminent Judge of this Court, the late Lord Justice *James*, in *Ex parte Walton* (2), it may possibly be held in some other jurisdiction that the effect of the disclaimer would be to relieve the original lessee, who has assigned the lease to the bankrupt, from all liability upon his covenants with the lessor, exactly in the same way as if there had been an actual surrender of the lease accepted by the lessor. The appeal is founded upon the suggestion that it may possibly be so held; and we must, therefore, address ourselves to the alternative views, first, that the view which was taken by two Judges in *Smyth* v. *North*, and at least by Lord Justice *James* in *Ex parte Walton*, is right; and, secondly, to the hypothesis that that view is not right.

If the view taken by the majority of the Judges in *Smyth* v. *North* and by Lord Justice *James* is correct (and I am certainly not going to express or intimate any opinion to the contrary), this appeal is wholly unnecessary, because the consequences apprehended would not follow from the disclaimer. If, on the other hand, that view is not correct, then we are asked to refuse leave to disclaim for the purpose, and solely for the purpose, of leaving the bankrupt's estate under the burden of onerous covenants, and so forth, from which it would be relieved, in accordance with the express object and policy of the 23rd section, if the disclaimer took place. In the one view the order appealed from is innocuous to the Appellants, and therefore ought not to be disturbed. In the other view, it would be against the policy of the statute to disturb it. We cannot think that the undertaking offered is either one with which the Court is upon any principle bound to be satisfied, or that it would practically effect the purpose of the section if the apprehension of the Appellants is well founded; for it would, in that view, leave the bankrupt's estate still under that liability to the person who made the assignment to him from which it would be relieved if the disclaimer were allowed. And, with regard to the suggestion that we should introduce into the order a declaration of opinion as to the effect of the disclaimer, not *quoad* the bankrupt's estate, but as between the lessor and a third party, as our reason for affirming the order which has been made, I can only say that, without in the least expressing or implying any opinion as to the propriety or otherwise of any such declaration which may have been made in any other case, it does not appear to me to be a necessary or a convenient or a proper course on this occasion to make such a declaration as has been asked. The appeal will be dismissed with costs.

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(1) Law Rep. 7 Ex. 242.

(2) *Ante*, p. 746.

BAGGALLAY and LUSH, L.JJ., concurred.

Kekewich, Q.C., asked for leave to appeal to the House of Lords.

LORD SELBORNE, L.C.:—

We all think that an appeal to the House of Lords would be an appeal from the discretion of the Court and not from a decision on a point of law; because the application of the Appellants is to our discretion to prevent an order being made which, according

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Ex parte EAST AND WEST INDIA DOCK COMPANY. *In re* CLARKE.

to the terms of the 23rd section, apart from the 28th rule, would certainly be authorized by law. It does not appear to us that we ought to give leave to appeal in such a case.

Solicitors for Appellants: *Freshfields & Williams.*
Solicitor for Lessee: *Soames.*
Solicitors for Trustee: *Rodgers & Clarkson.*
Solicitors for Mortgagees: *Hanbury, Hutton, & Whitting.*

W. L. C.

RANSON *v.* PATTON.

[1879 R. 54.]

C. A.
1881
May 20.

Practice—Order of Revivor.

A defendant, *P.*, gave notice of appeal from a judgment, and set it down. After this he died, and his executrix obtained an order of course at the Rolls that the appeal might be carried on and prosecuted by her in like manner as it might have been carried on and prosecuted by *P.* if he had not died.

Held, that the order was sufficient, and that the executrix was entitled to proceed with the appeal.

THIS was an action by the Plaintiff, as equitable mortgagee of the *Original Hartlepool Collieries Company*, against the company and *John Patton* to enforce his security. The question in the action was whether the Plaintiff's security was entitled to priority over that of the Defendent *Patton*, or whether they ranked *pari passu*. Vice-Chancellor *Bacon*, on the 16th of June, 1880, decided that the Plaintiff had priority over *Patton*, dismissed a counter-claim by the latter with costs, and made the usual foreclosure decree, on the footing that *Patton* was second mortgagee. *Patton*, on the 3rd of September, 1880, gave notice of appeal, and set it down for hearing. He died on the 8th of December, having appointed his wife his executrix.

On the 6th of May, 1881, the executrix obtained on petition as of course at the Rolls an order "that the said appeal be carried on and prosecuted by the Petitioner in like manner as such appeal might have been carried on and prosecuted by the said *John Patton* if he had not died."

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RANSON
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The appeal now came on to be heard.

Rigby, Q.C., and *Oswald*, for the Plaintiff, took the preliminary objection that the order to carry on the appeal ought to have been obtained from the Court of Appeal, and that the appeal could not be prosecuted under the common order of revivor.

Macnaghten, Q.C., and *Caldecott*, *contrà*.

THE COURT (*Jessel*, M.R., and *James* and *Lush*, L.JJ.) held that the order of revivor was sufficient, and that the appeal must proceed.

The case was then heard on the merits, and it was decided that the securities of the Plaintiff and *Patton* ranked *pari passu*.

Solicitors for Plaintiff: *Paterson, Snow, & Bloxam.*
Solicitor for *Patton*: *J. McDiarmid.*

H. C. J.

C. A.
1881
May 25.

EMDEN *v.* CARTE.

[1880 E. 0271.]

Bankruptcy—Undischarged Bankrupt—Earnings of Personal Labour—Architect—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), s. 17—*Practice—Adding Plaintiff—Rules of Court*, 1875, *Order* XVI., *r.* 13.

7 P.D. 33

The Plaintiff, who was an architect, sued for remuneration in respect of employment under a contract made in 1877, and for damages for an alleged wrongful dismissal from such employment in 1880. The Plaintiff was adjudicated bankrupt in 1878, and had never obtained his discharge:—

Held (affirming the decision of *Fry*, J.), that the cause of action for remuneration and damages passed to the trustee, and that the proper course was to add him as co-Plaintiff in the action, and give him the conduct of the action.

THIS was an appeal from a decision of Mr. Justice *Fry* (1).

The Plaintiff, who was an architect and surveyor, became bankrupt in 1878, and subsequently, without the consent of his trustee, acted as architect for the Defendant under a prior agreement of

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(1) *Ante*, p. 169.

See on same pt 19 Ch D. 313.

April, 1877. He commenced the present action in 1879, claiming an injunction to restrain the Defendant from employing any other person as architect; specific performance of the agreement of 1877; remuneration for his services, and damages for wrongful dismissal. The Defendant paid £360 into Court, and denied that he was further indebted to the Plaintiff.

The Plaintiff was still an undischarged bankrupt. It appeared from the evidence that the Plaintiff had an office and employed several clerks.

On a summons taken out by the trustee in the bankruptcy, the Judge made an order adding him as co-Plaintiff, and giving him the conduct of the action.

The Plaintiff appealed from this order.

Beddall, for the Appellant:—

The earnings of the personal labour and skill of a bankrupt do not pass to his trustee. The contracts undertaken by the bankrupt could not have been performed by the trustee; therefore the remuneration for them cannot pass to him: *Beckham* v. *Drake* (1); *Williams* v. *Chambers* (2); *Kitson* v. *Hardwick* (3).

At all events, the trustee cannot sue on the claim for damages for wrongful dismissal of the bankrupt: *Ex parte Vine* (4).

F. Turner and *Vennell*, for the trustee, were not called on.

JESSEL, M.R.:—

I entirely agree with Mr. Justice *Fry*. There is no doubt that the words in the *Bankruptcy Act* are wide enough to pass this money to the trustee. If it does not pass to the trustee, the burden is on the bankrupt to prove that it does not. It is said that the daily wages of an artisan do not pass to the trustee, because the bankrupt must live. But that has no application to a case like the present. The Plaintiff is an architect carrying on his business in the usual way, with an office and clerks, and he claims a large sum of money for plans and specifications prepared in his office. Is it to be supposed that he can get all this money

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(1) 2 H. L. C. 579.
(2) 10 Q. B. 337.
(3) Law Rep. 7 C. P. 473.
(4) 8 Ch. D. 364.

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and keep it, being an uncertificated bankrupt? I am sure no Judge has ever thought of such a thing. In the case of the medical practitioner, it was argued that this money was earned by his personal skill as a medical man, and that it made no difference that he sold medicines. But the Judges held that he could not recover. In the present case it is impossible to suppose that the Plaintiff can recover; therefore the Judge came to a right conclusion as to the title of the trustee, and that being so, there was no objection to the trustee being made a party as co-Plaintiff.

JAMES, L.J., concurred.

LUSH, L.J.:—

I am of the same opinion. The Act made all the property acquired after the adjudication pass to the trustee. It has been held that what the bankrupt earns by daily labour to support life does not vest in the trustee. But if he earns a margin, that is a profit and goes to the trustee. Two cases have been referred to; one was that of a medical practitioner, and the other a furniture broker, and in both cases the money earned was held to belong to the trustees. And that was a good defence to the action, because at that time the trustee could not be joined as a co-Plaintiff. The same result would follow here, but that the *Judicature Act* allows the trustee to be added as a co-Plaintiff. The appeal must be dismissed with costs.

Solicitors: *F. C. Tudor; J. J. Winser; Beyfus & Beyfus.*

M. W.

In re GOSMAN.

C. A.
1881
June 24.

10 Ch D 64

Will—Bona Vacantia—Administration by Executors—Assignment to the Crown—Claim by Next of Kin—Interest payable by the Crown.

The trustees and executors of a will administered the estate, and upon its being decided in a suit instituted for the purpose that there was an intestacy, and no heir or next of kin being discovered, the trustees assigned the leasehold property to the Solicitor for the Treasury, to be held for the benefit of the Crown. The claimants, six years afterwards, established their claim as next of kin of the testator, and the Court declared them entitled:—

Held (reversing the decision of *Malins*, V.C.), that the Crown was not chargeable with interest on the rents and profits received from the property while in its possession.

THIS was an appeal from a decision of Vice-Chancellor *Malins* (1).

The facts, which are fully stated in the previous report, were shortly as follows:—

W. Brownlie, by his will, dated the 14th of February, 1862, gave considerable freehold, leasehold, and other personal property to trustees without declaring any trusts.

Upon a suit being instituted it was declared that there was a secret trust which was void under the *Statute of Mortmain*. An inquiry was then directed as to the next of kin, and no person coming forward, the executors, in June, 1873, conveyed the leaseholds and other personal property to the Solicitor to the Treasury, as nominee of the Crown under the Queen's warrant. The value of the property amounted to upwards of £40,000.

In 1879 a petition of right was presented by persons who claimed to be next of kin to the testator, and they succeeded in establishing their right.

The question was then raised whether the Crown ought to pay interest on the sums received by it while in possession of the property.

The Vice-Chancellor held that the Crown was chargeable with interest at £4 per cent., and an appeal was brought from this decision.

Stirling, for the Crown, was stopped by the Court.

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(1) 15 Ch. D. 67.

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Higgins, Q.C., and *G. Murray*, for the claimants.

J. Pearson, Q.C., and *Romer*, Q.C., for persons in the same interest.

JESSEL, M.R.:—

There is no ground for charging the Crown with interest. Interest is only payable by statute or by contract.

BAGGALLAY and LUSH, L.JJ., concurred.

Solicitors: *Hare & Fell; Ewbank & Partington.*

M. W.

(whole).

C. A.
1881
June 24.

WILLMOTT *v.* BARBER.

[1879 W. 48.]

Practice—Costs by way of Penalty—Appeal for Costs.

The Judge, at the trial of an action in which there was a claim and counter-claim, thinking both parties in the wrong, dismissed the action without costs, and also dismissed the counter-claim with costs, but ordered that if the costs of the counter-claim should not amount to half the whole costs of the action the Defendant should pay the difference to the Plaintiff:—

Held, that the order as to costs was irregular, inasmuch as, after dismissing the action without costs, it imposed part of the costs of the action upon the Defendant by way of penalty; but that in substance the order was within the discretion of the Judge, as it amounted to dismissing the claim and counter-claim and directing the Defendant to pay half the whole costs of the action.

IN this case the action was brought for specific performance of an agreement for the sale of some leasehold property. The Defendant, the vendor, resisted the claim, and made a counter-claim for damages in respect of certain acts of waste and trespass which he alleged the Plaintiff to have committed. Mr. Justice *Fry* being of opinion that the Plaintiff's claim failed, and also that the charges made by the Defendant in the counter-claim were frivolous, dismissed both claim and counter-claim, and made the following order as to costs:—

"The Court doth order that the action be dismissed without costs: that the costs of the Plaintiff of this action and counter-claim be taxed, and that the counter-claim be dismissed with costs, to be taxed and paid by the Defendant to the Plaintiff.

"And in case such last-mentioned costs shall not amount to one-half of the Plaintiff's costs of the action and counter-claim, then it is ordered that the Defendant pay to the Plaintiff such a sum as will, with such costs, amount to such one-half of the entire costs of the action and counter-claim" (1).

The Defendant appealed from the last clause of this judgment.

Bagnold (*North*, Q.C., with him), for the Appellant.

Cookson, Q.C., and *T. A. Roberts*, for the Plaintiff, objected that this was simply an appeal for costs. The Judge had a discretion to make the Defendant pay a moiety of the costs. This is all he has done, though the order may be drawn up in an informal way.

Bagnold, for the Appellant:—

The Judge has gone beyond his jurisdiction, and therefore it is a case in which an appeal will lie. He first dismissed the action without costs, and after doing so he could not make any other order as to the costs of the action. But he proceeds to order that if half the whole costs of the action and counter-claim exceed the costs of the counter-claim the Defendant is to pay the excess. This is an order for payment by way of penalty, which the Judge had no jurisdiction to make. The costs of the counter-claim are comparatively small, because the main evidence was on the defence.

JESSEL, M.R.:—

I regret that we should have to decide this point, for the question hardly justifies the cost of an appeal. It is an appeal from an order of Mr. Justice *Fry*, which is wrong in form. No doubt a Judge has no power to order any party to pay a sum by way of penalty beyond the costs of the claim and counter-claim. That has been often decided, and I am sure that Mr. Justice *Fry* had no

(1) 15 Ch. D. 96.

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wish to interfere with that rule. But the order is only wrong in form. It would have been quite right if it had said, "Dismiss the action without costs, except so far as hereinafter declared," and then gone on to make the declaration respecting the costs of the counter-claim. Therefore in substance, though not in form, this is an appeal for costs.

The Judge has a large discretion as to costs. He may make the Defendant pay the costs of some of the issues in which he failed, although he may have succeeded on the whole action. Or he may say that both parties are wrong, but that he could not apportion the blame in a definite proportion, and therefore would dismiss the claim without costs. Or he might say that the Plaintiff should have half the costs of the action, or some other aliquot part. Or he may follow the course which I sometimes adopt, and I generally find that the parties are grateful to me for doing so, namely, fix a definite sum for one party to pay to the other, so as to avoid the expense of taxation, taking care in doing so to fix a smaller sum than the party would have to pay if the costs were taxed. All these cases are fairly within the meaning of sect. 49 of the *Judicature Act*, 1873, and there is no appeal from the discretion of the Judge.

I feel no doubt, from reading the judgment of Mr. Justice *Fry*, that what he intended was, that the Defendant should pay half the costs of the whole litigation, and this was quite within his discretion. That being so, I think that the right order will be to dismiss both the claim and the counter-claim, and that the Defendant shall pay half the costs of the action and the counter-claim. The effect of the order as drawn up is, that if the costs of the counter-claim should exceed half the costs of the action and counter-claim the Defendant would have still to pay the whole costs of the counter-claim. I do not think that would be right. The order will be confined to making the Defendant pay half the costs of the action and counter-claim. There will be no costs of the appeal.

BAGGALLAY and LUSH, L.JJ., concurred.

Solicitors: *G. Badham; G. J. & P. Vanderpump.*

M. W.

In re BRUÈRE (A PERSON OF UNSOUND MIND).

C. A.
1881
June 25.

Practice—Lunacy—Appointment of Committee out of the Jurisdiction.

It being proposed to appoint as committee a person resident out of the jurisdiction, the Master in Lunacy reported that as the proposed committee was resident out of the jurisdiction he could not approve of him. The Court, though satisfied of the expediency of appointing him, declined to do so until the Master had certified that the proposed committee was a person whom, if resident within the jurisdiction, he should have approved.

THE lunatic resided in *Yorkshire*, and was found lunatic in January, 1874. His sister, *Mary Anne Mackey*, then the wife of *James Vokes Mackey*, was his heiress-at-law and sole next of kin. In 1878 *Raymond S. Bruère* and *Richard Boulton* were appointed committees of his person and estate. *Boulton* died in January, 1878, and on the 23rd of March, 1878, Mr. and Mrs. *Mackey* and *Raymond S. Bruère* were appointed committees of the person and estate. Mr. and Mrs. *Mackey* were then resident in *Dublin.*

Master *Graham*, by report dated the 14th of June, 1881, certified that Mr. *Mackey* had died, and that *Raymond S. Bruère* did not wish to be reappointed. He certified that Mrs. *Mackey* was the heiress-at-law and sole next of kin of the lunatic, and that *Bruère Vokes Mackey* was her eldest son, and resided at *Dublin*, and that it was proposed that Mrs. *Mackey*, *B. V. Mackey*, and *W. H. Domville* should be appointed committees of the person and estate of the lunatic, and that they had consented to act as such committees, and undertaken to visit him every three months and see that he was duly attended to, and to give the usual security. The Master then, after reporting on various other matters, proceeded to state that Mrs. *Mackey* and *Domville* were fit and proper persons to be appointed committees of the person and estate, and "that the said *B. V. Mackey* being resident out of your Lordships' jurisdiction I am unable to approve of him as a fit and proper person to be appointed one of the committees of the person and estate of the said *W. S. Bruère.*"

The present petition was presented by Mrs. *Mackey*, *B. V. Mackey*, and *Domville*, and stated, among other things, that since the date of the report Mrs. *Mackey* had found herself in such feeble health that she could not undertake the duties of committee, and that she was desirous that *B. V. Mackey* and *Domville* should be appointed committees of the person and estate. That *B. V. Mackey* had his ordinary residence in *Ireland,* but was in the habit of constantly coming to *England,* and was in all respects a fit and proper person to be appointed committee jointly with *Domville,* but that as he was resident out of the jurisdiction the Master could not recommend him for appointment. The petition asked that *Domville* and *B. V. Mackey* might be appointed committees of the person and estate; that certain payments authorized by the report of the 14th of June, 1881, might be continued; that a proposed yearly payment of £200 to Mrs. *Mackey* mentioned in that report might be allowed, "and that all matters arising in the said report and the previous reports in this matter, and the appointment of the Petitioners, *W. H. Domville* and *B. V. Mackey,* as committees, may be referred to the Master in Lunacy for the purpose of having effect given thereto."

Marten, Q.C., and *Wolstenholme,* for the petition:—

The Master could not recommend Mr. *B. V. Mackey* as one of the committees because he was resident out of the jurisdiction, but this is no difficulty in the way of the Court appointing him, and such an appointment was made in 1878.

[BAGGALLAY, L.J.:—On that occasion the Master stated that he should have recommended Mr. *Mackey* if he had not been out of the jurisdiction. He does not say so on the present occasion.]

We have evidence of the fitness of Mr. *B. V. Mackey.*

[BAGGALLAY, L.J.:—The prayer that "all matters arising on the previous reports in this matter may be referred to the Master in Lunacy for the purpose of having effect given thereto" is very vague and general.]

We believe that such a direction is usual.

BAGGALLAY, L.J.:—

I think that the general direction should be confined to matters arising on the report of the 14th of June, 1881. If, before the order is drawn up, it is found that there are matters provided for by the previous reports which have still to be attended to, the petition can be amended for the purpose of specifying them, but they ought not to be dealt with by mere general words.

C. A.
1881
In re BRUÈRE (A PERSON OF UNSOUND MIND).

As regards the appointment of Mr. *B. V. Mackey*, the evidence of his fitness appears quite satisfactory, but it would be a departure from the usual practice, and would be setting a bad precedent, to appoint a committee who has not been approved by the Master. Here the Master does not say that he only forbears to approve of Mr. *B. V. Mackey* because he resides out of the jurisdiction, but says that he cannot approve of him because he resides out of the jurisdiction. The Master will no doubt be ready to amend his report by saying that he should have approved of Mr. *Mackey* if he had resided in *England*, and upon that being done the order appointing him may be drawn up as of to-day.

LUSH, L.J., concurred.

Solicitors: *Domville, Lawrence, Graham, & Long.*

H. C. J.

M. R.
1880
Dec. 6.

In re GOWAN.
GOWAN *v.* GOWAN.

[1880 G. 1899.]

Practice—Husband and Wife—Settlement, Order for—Joint Power of Appointment among Children—Form of Settlement—Stamp.

In settling a fund in pursuance of a will by which the fund was bequeathed to a man until marriage and then to be settled on his wife and children, the Court inserted a power for the husband and wife jointly by deed, and for the survivor by deed or will, to appoint among the children.

Observations on *Oliver* v. *Oliver* (1).

Form of judgment settling a fund.

An order of the Court making a settlement should bear the usual settlement stamp.

SARAH C. GOWAN, widow, by her will, dated in 1874, bequeathed as follows: "I bequeath to my son, *Bowie Campbell Gowan*, the sum of £5000 sterling, to be held by my trustees and executors until he is married, the said sum then to be settled on his wife and children. Should he die without leaving children, the said sum is to revert to the residue of my estate, and be disposed of as I shall hereinafter appoint." And the testatrix bequeathed the residue of her personal estate to her three daughters equally.

By a codicil the testatrix revoked the gift of her residuary personal estate and gave the same to her three daughters, with the condition that if they or either of them should die without leaving a child or children at their deaths, the share of such one so dying should be divided equally between her brothers.

The testatrix died in 1877.

In 1875, *Bowie Campbell Gowan*, the Plaintiff in the present action, married *Leila Gowan*, and she and the two infant children of the marriage were Defendants in the action.

A question having arisen as to the manner in which the legacy of £5000 given in favour of the Plaintiff should now be settled, he instituted this action against the trustees and executors of the will, his two brothers, his three sisters, and his wife and children, for the administration of the estate of the testatrix so far as might be necessary to give effect to the bequest of the £5000 in favour of the Plaintiff and the direction in her will to settle the same.

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(1) 10 Ch. D. 765.

The action now came on upon motion for judgment.

Langworthy, for the Plaintiff:—

The only question is, what is the form of settlement the Court will direct. I submit that the settlement should contain trusts for the husband and wife successively for life, and then powers for the husband and wife jointly during the coverture by deed, and for the survivor by deed or will, to appoint the fund amongst the children, with remainder, in default of appointment, to the children equally. But in *Smithers* v. *Green* (1), powers of appointment were omitted from the settlement; and it is stated that that form was approved of by your Lordship as the proper settlement in the absence of any special circumstances. In *Oliver* v. *Oliver* (2), where the fund was the wife's, Mr. Justice *Fry* directed the insertion of a power to the wife only to appoint amongst the children, observing that the authorities did not go to the extent of giving a joint power of appointment to the husband and wife. It seems clear, reading the gift over with the previous gift, that the husband is entitled to an interest under the proposed settlement.

Cecil Russell and *Langley*, for the Defendants.

JESSEL, M.R., after observing that the effect of the gift in favour of the son and the gift over on his dying without children, when read together, was to give him an interest in the trust fund, continued:—

The only question then is as to the form of the settlement. There must have been some special reason for the form of the settlement in *Smithers* v. *Green*. In ordinary cases the husband and wife, or the survivor, ought to have powers of appointing the fund amongst the children. I have no doubt that the Court has full power as to the form of the settlement. In *Spirett* v. *Willows* (3), Lord Justice *Wood*, in giving judgment, said: "As

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(1) Seton on Decrees, 4th Ed. p. 675.

(2) 10 Ch. D. 765.

(3) Law Rep. 4 Ch. 407, 410.

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GOWAN *v.* GOWAN.

regards the limitations and powers in favour of the children, we think that what the Court has to look to is, that this portion of the fund should be settled in a usual and proper form for the benefit of the wife and children." I am satisfied that, as a rule, it is very desirable that both the parents should have a power of appointing the fund amongst the children, and I am of opinion that I have power to insert clauses to that effect in the settlement.

What Mr. Justice *Fry* is reported to have said in *Oliver* v. *Oliver* (1) appears to me to be contrary to the opinion expressed by Lord Justice *Baggallay* in the case of *Cogan* v. *Duffield* (2), which does not appear to have been cited to Mr. Justice *Fry*. The Lord Justice says, "The mode of settling a wife's fortune which is approved by the Court is to give her the first life interest for her separate use, then a life interest to the husband, then, subject to powers given to the husband and wife of appointing the fund among the issue of the marriage, it is given equally to such of the children as being sons attain twenty-one, or being daughters attain that age or marry, or else to the children equally, with gifts over in favour of the others, if any of them being sons die under twenty-one, or being daughters die under that age and unmarried."

I therefore direct that the settlement in this case shall contain a limitation of the fund to the husband for life, with remainder to the wife for life, with remainder to the children as the husband and wife shall by deed jointly appoint, with remainder as the survivor shall by deed or will appoint (but if the husband is the survivor he is to have power to appoint amongst his children by a future marriage); with an ultimate remainder to all the children of the husband attaining twenty-one, or, in the case of daughters, marrying under that age. The order must bear a settlement stamp.

The judgment was in the following form:—

"Upon motion for judgment, &c., this Court doth declare that the legacy of £5000 given by the will of the above-named *S. C. Gowan*, the testatrix in this action, in favour of the Plaintiff, and otherwise, as in the will mentioned, is to be held and settled as follows, that is to say, upon trust for the Plaintiff during his life, and after his death upon trust for the Defendant *Leila Gowan* for her life, and after the death of the survivor of the Plaintiff and the Defendant, *L. Gowan*, upon trust for all or such one or more exclusively of the others or other of the children of the Plaintiff by his present wife, the Defendant *L. Gowan*, in such manner and with such provisions as the Plaintiff and the Defendant *L. Gowan*, shall by any deed or deeds, with or without power of revocation and new appointment jointly appoint; and in default of and subject to such appointment, in case the Defendant, *L. Gowan*, shall survive the Plaintiff, then as she shall in like manner or by will appoint: but if the Plaintiff shall survive the Defendant *L. Gowan*, then upon trust for all or such one or more exclusively of the others or other of the children of the Plaintiff by his present or any after-taken wife, in such manner and with such provisions as the Plaintiff shall appoint by deed or will; and in default of and subject to any such appointment as aforesaid, upon trust for all the children or any the child of the Plaintiff by his present or any after-taken wife who being male shall attain the age of twenty-one years, or being female shall attain that age or marry under that age, and, if more than one, in equal shares: And in default of any child of the Plaintiff who shall become entitled under the before-mentioned trusts or powers as aforesaid and the power of advancement hereinafter mentioned, upon trust as part of the residuary estate of the said testatrix, and to be disposed of accordingly. And it is ordered that the said fund is to be settled with the usual trust for investment authorizing such investments as are authorized by the Court for the investment of moneys subject to the control of the Court, the usual hotchpot provision, and the usual powers of maintenance, education, accumulation, and advancement." Direct payment out of the personal estate of the testatrix of costs as between solicitor and client, including trustees' costs, charges, and expenses, such costs, &c., to be taxed in case the parties differ. And the Defendants, *E. G.* and *C. D. G.* (two of the trustees and executors who did not prove the will), by their counsel disclaiming the trusts, Appoint the Defendants *P. G.* and *J. G.* (the Plaintiff's two brothers) trustees in their place to act, in conjunction with the Defendants, *C. C. G.* and *J. H.* (the two proving executors and trustees), as trustees of the said legacy of £5000. Stay further proceedings.

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(1) 10 Ch. D. 765.

(2) 2 Ch. D. 44, 49.

Solicitors: *Hores & Pattisson.*

G. I. F. C.

M. R.
1881
Jan. 20.

CORPORATION OF BIRMINGHAM *v.* BAKER.

[1880 B. 186.]

Street Improvements—Expenses of Sewering and Paving—Private Improvement Expenses—Charge upon "Premises"—Leasehold Interest—Charge on Total Ownership—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 4, 257.

The charge created by sect. 257 of the *Public Health Act*, 1875, for expenses incurred by a local authority for sewering and other works, and for the payment whereof the owner of the premises in respect of which the same are incurred is liable under that Act, is a charge upon the "premises" as defined by sect. 4: accordingly, it is a charge, not on the interest of any particular owner of the premises, but on the total ownership, that is to say, on the respective interest of every owner for the time being in proportion to the value of his interest.

THIS action came on for argument by way of demurrer upon a question of law raised by the statement of defence of the Defendant, *Dorothy Baker*. The statement of claim alleged as follows:—

In the month of November, 1877, the Plaintiffs, the Corporation of *Birmingham*, being the urban sanitary authority of the borough under the *Public Health Act*, 1875, served one *John Collett*, who was the lessee for a term of 999 years, "and the owner within the meaning of the 4th section of the said statute," of certain houses fronting and abutting on *Turner Street, Birmingham*, with a notice, under the 150th section, to sewer, level, pave, flag, and channel those parts of the said streets on which the said houses fronted or abutted, such street not being a "highway repairable by the inhabitants at large" within the meaning of the statute. *Collett* failed to comply with such notice, whereupon the Plaintiffs, as the urban authority, executed the works, *Collett* being, at the date of their completion, "the owner as aforesaid" of the said houses. Upon the completion of the works the Plaintiffs' surveyor duly apportioned the expenses of the same, and a demand was served upon *Collett* for payment of the amount apportioned in respect of his said houses. This he failed to pay, and in October, 1879, he filed a petition for liquidation by arrangement in the *Birmingham* County Court: in November resolutions for that purpose were passed, and the Defendant *Harrison* was appointed trustee of his estate.

In July, 1876, *Collett* had mortgaged the houses for the full term, less a nominal reversion, to the Defendant, Miss *Dorothy Baker*, for £2850 and interest. Two days after *Collett* filed his petition for liquidation Miss *Baker* entered into possession of the property, and she had since been in receipt of the rents thereof.

The 257th section of the *Public Health Act*, 1875, enacts that "Where any local authority have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act or by any agreement with the local authority, such expenses may be recovered, together with interest at a rate not exceeding £5 per centum per annum, from the date of service of a demand for the same till payment thereof, from any person who is the owner of such premises when the works are completed for which such expenses have been incurred, and until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred . . . . Where such expenses have been settled and apportioned by the surveyor of the local authority as payable by such owner, such apportionment shall be binding and conclusive on such owner, unless within three months from service of notice on him by the local authority or their surveyor of the amount settled by the surveyor to be due from such owner, he shall by written notice dispute the same. The local authority may, by order, declare any such expenses to be payable by annual instalments within a period not exceeding thirty years, with interest at a rate not exceeding £5 per centum per annum, until the whole amount is paid; and any such instalments and interest, or any part thereof, may be recovered in a summary manner from the owner or occupier for the time being of such premises, and may be deducted from the rent of such premises, in the same proportions as are allowed in the case of private improvement rates under this Act."

The time limited by this section for disputing the apportionment having expired, the Plaintiffs claimed a declaration that the amount (less a sum which had already been recovered from *Collett*), with interest, was "a charge on the said premises" in *Turner*

Street; also an order that the charge so declared might have priority over the mortgage of the Defendant, Miss *Baker:* and that for the purpose of enforcing the charge, the leasehold interests of the Defendants, *Harrison* and *Baker*, might be sold.

The question of law now argued was raised by an allegation in Miss *Baker's* statement of defence that, according to the true construction and effect of the 257th section of the *Public Health Act*, 1875, the expenses incurred by the Plaintiffs in or about the execution of the works in the statement of claim mentioned were only a charge on the estate and interest of the person who was the "owner" of the premises within the meaning of the Act, and that the charge (if any) to which the Plaintiffs were entitled had no priority over but was subsequent to the Defendant's mortgage.

Ince, Q.C., and *W. Barber*, for the Defendant, Miss *Baker*:—

Looking at the whole of the 257th section of the *Public Health Act*, 1875, and particularly the latter half of it, the meaning apparently is that the expenses in question are to be recovered from the "owner," who is defined by the interpretation clause (sect. 4) to be "the person for the time being receiving the rack-rent of the lands or premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent." We therefore submit that the only charge (if any) the Plaintiffs are entitled to is a charge upon the interest of *Collett* or his trustee as landlord and as "owner" within that definition; or possibly upon the interest of the freeholder, who ought, strictly speaking, to have been made a party to the action, though, having regard to the length of the term, we do not insist on that objection.

[*Chitty*, Q.C.:—In *Tottenham Local Board of Health* v. *Rowell* (1) the Court of Appeal have already decided the point, for they held, upon the 62nd section of the *Public Health Act*, 1858—which corresponds to the 257th section of the *Public Health Act*, 1875—that the expenses were a charge on the property, and not on any particular interest in the property.]

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(1) 15 Ch. D. 378.

In that case the question between mortgagor and mortgagee, which we have here, did not arise.

Chitty, Q.C., and *De Courcy Atkins*, for the Plaintiffs, were not called upon.

JESSEL, M.R.:—

I am of opinion that the Plaintiffs are entitled to a charge on the "premises," which, by the definition clause (sect. 4) includes "messuages and buildings." That is the literal meaning of the 257th section; and not only is there no context to control the literal meaning, but the good sense of the thing is entirely with the literal meaning. Even irrespective of good sense, this being an Act of Parliament, I should have held myself bound, in the absence of any absurdity or any context to control it, to give effect to the literal meaning; but as I said before, the good sense of the thing is with it. The works in question are an improvement to the property, not to the interest of any particular owner of the property, but of every owner of the house; and consequently there is no good reason in the world why there should not be a charge on the property, that is, on the respective interest of every owner of the property according to the value of his ownership.

I am very glad to find that, there being very similar words in a very similar Act of Parliament, the point came before the Court of Appeal in *Tottenham Local Board of Health* v. *Rowell* (1). There Lord Justice *James* says (2), "The premises, no doubt, mean the property which has been improved, and not any particular interest in the property:" here we have a definition clause, and, therefore, we can say it is certainly so. And he says again (3), "The works were done for the benefit of the property, fitting the property for building, and the like, and therefore it is not at all unreasonable or surprising to find it declared in an Act of Parliament in default of other remedies, that the property which is improved, and which has had the benefit, must bear the *onus*." I agree, it is most rational that the property which has been improved should bear the burden, and that all the houses in

(1) 15 Ch. D. 378.

(2) 15 Ch. D. 391.

(3) 15 Ch. D. 390.

the street shall bear their burden in proportion. Now, the houses *per se* being inanimate, they cannot bear the burden. If there be a charge on the houses it is a charge on the total ownership—if I may call it so, on the proprietorship; not on any particular section or portion of the proprietorship, but on the whole. In an ordinary case, in the absence of any covenants, it would be borne by every proprietor in proportion to his interest in the house. As a general rule, as between landlord and tenant, the tenant has to pay the improvement rates, and then, of course, they are primarily charged on his interest as between himself and his landlord. But if, as in this case, there is a 999 year's term, and there is no covenant—it does not appear whether there is a covenant in this case or not—then the rates would be apportioned properly between the landlord and the tenant, and the landlord's proportion would be virtually nothing, having regard to the length of the term. Consequently the objection for want of parties is very properly not insisted on in the present case; and there should be a note that no objection is to be taken at the trial for want of parties.

In the course of the discussion as to the form of the order, it appeared that *Collett's* trustee, the Defendant *Harrison*, had assigned the nominal reversion in the term to the Defendant mortgagee, Miss *Baker*, and had disclaimed all interest in the property.

HIS LORDSHIP thereupon made an order as follows:—On the question of law, the Court is of opinion that the sum claimed, with interest, is a charge on the interest of the Defendant, *Dorothy Baker*, and orders the Defendant to pay the costs of this application in any event. His Lordship also directed a note to be taken that no objection should be raised at the trial on the ground that the freeholder was not a party to the action.

Solicitors: *Sharpe, Parkers, & Co.*, agents for *E. J. Hayes*, Town Clerk, *Birmingham*; *Layton & Jaques*, agents for *E. Jaques*, *Birmingham*.

G. I. F. C.

CLARBROUGH *v.* TOOTHILL.

[1879 C. 248.]

M. R.
1881
June 23.

Practice—Action in Chancery Division—Arbitrator—Compelling Attendance of Witness—Subpœna—3 & 4 Will. 4, c. 42, s. 40—Judicature Act, 1873, ss. 3, 16.

An order may now be made on summons in the Chancery Division, under 3 & 4 Will. 4, c. 42, s. 40, requiring the attendance of a witness before an arbitrator appointed in an action in that Division, and the order will be directed to be served as an ordinary subpœna.

AN arbitrator having been appointed in this action, the Plaintiff applied by summons, under 3 & 4 Will. 4, c. 42, s. 40, that one *Brierley* might be ordered to attend before the arbitrator to give evidence on his, the Plaintiff's, behalf, and produce a certain indenture. The Chief Clerk, however, declined to make an order, on the ground that, inasmuch as the Act related in terms only to Common Law actions, it seemed doubtful whether, even under the present practice, the Chancery Division had jurisdiction, and also whether the jurisdiction, if it existed, could be exercised by the Chief Clerk.

The matter was now mentioned to his Lordship.

Eastwick, for the applicant:—

Since by the *Judicature Act*, 1873, ss. 3 and 16, each Division of the High Court can now exercise the jurisdiction formerly possessed by the several Courts consolidated under that Act, I submit that the Chief Clerk has now the same power as the Master to make an order under sect. 40 of 3 & 4 Will. 4, c. 42. A subpœna to a witness to attend before an arbitrator not being effectual, the only course to compel his attendance is by obtaining the order I now ask for.

JESSEL, M.R., said it was clear that such an order might now be made on summons in the Chancery Division, and accordingly made the order as asked directing it to be served as an ordinary subpœna.

Solicitor: *C. Butcher.*

G. I. F. C.

V.-C. M.
1880
July 9;
Dec. 10.
1881
Jan. 12.

In re LUCAS'S WILL.

Will—Legacy—Substitution—Issue of Child dead when the Will was made.

A testatrix by her will gave a sum of money to trustees on trust, after the death of the widow of a cousin, for the children of the cousin, share and share alike; provided that in case of any of the children dying in the lifetime of the testatrix leaving issue, such issue should take the share to which their parent would have been entitled if living.

One of the children was dead when the will was made, and a codicil shewed that the testatrix was aware of this:—

Held, that the issue of that child took a share in the money.

In re Potter's Trust (1) followed.

CATHERINE LUCAS, by her will, dated the 14th of July, 1865, bequeathed (with other legacies) to *Robert Webb, Charles Webb*, and *George Webb*, children of the testatrix's late cousin *Robert Webb*, £100 each. The will then proceeded as follows:—"I give and bequeath unto my said trustees the several sums of £3200 and £1000 sterling, to hold to them, their executors, administrators, and assigns upon the trusts hereinafter declared, it being my wish that the said sum of £1000 shall be considered as a compensation to the widow and family of my late cousin *Robert Webb*, deceased, for the loss of certain benefits to which the said *Robert Webb* would have been entitled under the will of my said father in case he had survived my said father, but which became lapsed by his predecease. And I direct that my said trustees shall stand possessed of the said several sums of £3200 and £1000 upon trust to invest the same in the public stocks or funds of *Great Britain*, or upon Government or real securities in *England*, with power to vary and transfer such securities, or any of them, for or into other securities of the like nature, and to pay the interest and annual income of the same sums, and the stocks, funds, or securities in or upon which the same or any part thereof may be invested, to or for the benefit of *Zilpah Webb*, the widow of the said *Robert Webb*, deceased, during her life, for which interest and annual income her receipt alone, after the same shall have become due, shall be a sufficient discharge to my said trustees. And after her decease, I direct my said trustees to stand possessed of the said sums of £3200 and £1000, and the stocks, funds, and securities in or upon which the same shall be invested, and the interest, dividends, and annual income thereof, in trust for all the children of the said *Zilpah Webb*, equally, share and share alike; provided that in case of any of the said children of the said *Zilpah Webb* dying in my lifetime leaving issue, such issue, if only one, shall take the share or shares to which their deceased parent or parents would have been entitled if living, or if more than one, then equally amongst such issue as tenants in common, and to be vested interests, and payable to such issue respectively on attaining the age of twenty-one years."

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(1) Law Rep. 8 Eq. 52.

By a second codicil, dated the 6th of February, 1867, after reciting that by her will she had given legacies of £100 each to *Robert Webb*, *Charles Webb*, and *George Webb*, children of *Robert Webb*, deceased, and that the name of *George Webb*, who was then dead, had been inserted therein instead of *Joseph Webb*, another son of the said *Robert Webb*, the testatrix gave and bequeathed to the said *Joseph Webb* a legacy of £100, to be paid to him free of legacy duty within three calendar months after her decease in addition to the share which he would take of and in the sums of £3200 and of £1000 mentioned in her said will, after the death of his mother, *Zilpah Webb*. And in other respects the said testatrix confirmed her said will and the codicil thereto.

Catherine Lucas died in 1869, and her executors duly invested the sums of £3200 and £1000. *Zilpah Webb* died in 1879, and the trustees transferred the stock into Court.

Zilpah Webb had had six children, one of whom, *George Webb*, was dead at the time when the testatrix made her will, leaving four children. *Robert Webb*, another of the children of *Zilpah Webb*, had died in 1878. The other four were alive, and now presented a petition praying that the money might be divided into fifths and paid out accordingly to three of the children, to the trustees of a fourth, and to the executors of *Robert Webb*.

The only question was whether the children of *George Webb* were entitled to share.

J. Pearson. Q.C., and *Church*, for the Petitioners:—

Only the families of those brothers who were living when the

V.-C. M.
1880-81
In re LUCAS'S WILL.

will was made take any share, and the case is distinguishable from *In re Potter's Trust* (1), because here the testatrix has in her will and codicil recognised all who were to take anything, by giving each a legacy of £100. She knew that *George Webb* was dead, and the words of substitution in this will imply futurity and do not apply to one who was dead; *In re Thompson's Trusts* (2) is a clear authority: *Harris* v. *Harris* (3); *Martin* v. *Holgate* (4). *Loring* v. *Thomas* (5) was a different case. *Hunter* v. *Cheshire* (6) and *Habergham* v. *Ridehalgh* (7) shew what the law is.

W. W. Cooper, for other parties in the same interest, cited *Christopherson* v. *Naylor* (8) and *In re Hotchkiss's Trusts* (9).

Davidson, for other parties.

Vaughan Hawkins, for the children of *George Webb*:—

The usual inference is that the testator knows the state of the family, and this is exactly like *In re Potter's Trust*. So in *Jarvis* v. *Pond* (10) and *Giles* v. *Giles* (11). *In re Thompson's Trusts* is in its facts quite different from any other case, and has never been treated as establishing a principle. In *Hannam* v. *Sims* (12) Lord Justice *Knight Bruce* seems to doubt as to *In re Thompson's Trusts*. Putting that case aside, in every case the testator knew, or must have been presumed to know, the state of the family: *In re Jordan's Trusts* (13). *In re Sibley's Trusts* (14) shews that the decision is governed by the presumption of intention. In *Adams* v. *Adams* (15) the ground of the decision was the knowledge of the testator, and so in *In re Chapman's Will* (16).

J. Pearson, in reply:—

In most of these cases the presumption of intention has been founded on the moral duty to provide for descendants. Here

(1) Law Rep. 8 Eq. 52.
(2) 5 D. M. & G. 280.
(3) 11 Ch. D. 663.
(4) Law Rep. 1 H. L. 175.
(5) 1 Dr. & Sm. 497. 7 Jur NS 1116
(6) Law Rep. 8 Ch. 751.
(7) Ibid. 9 Eq. 395.
(8) 1 Mer. 320.
(9) Law Rep. 8 Eq. 643.
(10) 9 Sim. 549.
(11) 8 Sim. 360.
(12) 2 De G. & J. 151. 4 Jur NS.
(13) 8 L. T. (N.S.) 307.
(14) 5 Ch. D. 494.
(15) Law Rep. 14 Eq. 246.
(16) 32 Beav. 382. 11 Jur NS 565

the legatees are cousins only. How do we know that the testatrix intended to benefit the children of all her cousins? She has not said so in the codicil. The words of the will in this case are much more consistent with the limitation to such children as were alive when the will was made.

MALINS, V.C.:—

Having heard the able and elaborate arguments on this will, I entertain no doubt whatever as to the conclusion at which I ought to arrive. [His Lordship then read so much of the will and codicil as relates to the legacies of £100.] Now, I quite admit that the intention of the testatrix was to give legacies of £100 only to such of the children of *Robert Webb* as were alive. *Joseph Webb* was alive, *George* was dead; and the second codicil shews that she was aware of this when she made her will. Then she goes on to give the sums of £3200 and £1000 in these terms:—[The Vice-Chancellor read the clause.] The family of *Robert Webb* are here the objects of her bounty. Mr. *Pearson* says they are not near relations, but only cousins. I cannot draw any distinction between lineal descendants and collaterals. The testatrix does not seem to have had any brothers or sisters, and therefore cousins would be her nearest relatives, and that is very strongly shewn by her giving this legacy to the widow of *Robert Webb* for her life.

If the testatrix had not made a codicil, and the question had depended on the will, it would be exactly like the case of *In re Potter's Trust* (1), in which I decided (and it has been followed in many other cases, and I am not assuming too much when I say that that case forms a rule of the Court, and will be so till it is reversed by higher tribunals) that where there is a gift to a class of persons, with substitution to their issue in case of their dying—that means whether they are dead when the will is made or die afterwards—the substituted class takes in each case. I can draw no distinction between a gift for the benefit of the children of a legatee, whether that legatee is dead before the date of the will or dies afterwards. I cannot attribute to the testatrix an intention of shewing less favour to the children of a cousin who died before

(1) Law Rep. 8 Eq. 52.

than to those of a cousin who died after the will was made. All that I have gone into in *In re Potter's Trust* (1), and it is not necessary for me to repeat it now.

But Mr. *Pearson's* argument is that that case proceeded on the assumption that the testator did not know that the person was dead. I do not think that is material. These things must go on general principles, and the more general they can be made the better. A testator says: "I give my property to my brothers and sisters; but if any of my brothers shall die, the property which they would have taken shall go to their issue." One is dead, but he does not know of it. Why should those children be excluded? He had no intention to exclude them. On the contrary, he had an intention to include them. He has the same affection for the children of those who die before he makes his will as for the children of those who die afterwards. The rights must be ascertained at the death of the testatrix. Here the testatrix, by her codicil, mentions that *George* is dead, and she takes away the legacy of £100 which she would have ineffectually given him, and says that *Joseph* is to have that £100. It is said that that shews that she did not intend *George's* children to take. Why, then, did she not say so? I must attribute to her that knowledge of the law which I must attribute to all Her Majesty's subjects, and I must attribute to her the knowledge that *George's* children would take the same legacy as the children of the other legatees. She does not say, "*George* is dead, and therefore *George's* children are not to take." So far from saying that, she concludes the codicil by confirming the will in all other respects. The consequence is, that all the issue of the children of *Robert Webb*, her cousin, who died before her leaving issue are to take, and it is to be divided into as many shares as there were children of *Robert Webb*.

That, in my opinion, is the decision at which, upon principle, I ought to arrive. Then, how do the authorities stand?

The authorities on the subject are uniform. In *Giles* v. *Giles* (2) it was decided that the children of a deceased child were entitled to share. In *Jarvis* v. *Pond* (3) the bequest was "to such of my

(1) Law Rep. 8 Eq. 52.

(2) 8 Sim. 360.

(3) 9 Sim. 549.

sons and daughters as may be living at the decease of the said *Mary;* and in case of the decease of any of my said sons or daughters, the surviving children of any of my sons or daughters to have their father's or mother's part;" and it was held that the children of a son and daughter who were dead when the will was made were entitled to share. In *Loring* v. *Thomas* (1) a child was dead when the will was made, but the issue of that child shared. I followed these cases in *In re Potter's Trust* (2), considering the rule to be established and founded in good sense, that when a man gives legacies to brothers or their children, he always intends the children to be substituted for the parent whenever the parent may have died. Since that I have decided *Adams* v. *Adams* (3), where one of the brothers appeared to have died fifteen years before, and yet I held that the children took by way of substitution. Since that case, *In re Sibley's Trusts* (4) has been decided; and if that does not go to the whole length of this case, *In re Smith's Trusts* (5) does, and nothing can be more pointed than the words used by the Master of the Rolls in deciding that case. [His Lordship read the judgment.] It does not appear from the report that the testator knew of the death, but I assume that he did. These are the only cases since *In re Potter's Trust*, and they all proceed upon the same principle. But Mr. *Pearson* relied upon *In re Thompson's Trusts* (6). That was a very peculiar case, and even assuming it to have been well decided (and I have the greatest respect for the Judges by whom it was decided), I question if the case would now be decided in the same way. But the principle of the decision was that the Lords Justices thought the intention of the testator was only to benefit the children of living children. This is more expressly stated in *In re Jordan's Trusts* (7); and I do not consider that *In re Thompson's Trusts* stands in the way.

Upon the whole case, therefore, I have come to a conclusion which is entirely satisfactory to my own mind, that, in this case, inasmuch as the substituted gift was to the children of all the

(1) 1 Dr. & Sm. 497. 7 Jur N.S. 1118
(2) Law Rep. 8 Eq. 52.
(3) Ibid. 14 Eq. 246.
(4) 5 Ch. D. 494.
(5) Ibid. 497, n.
(6) 5 D. M. & G. 280.
(7) 8 L. T. (N.S.) 307.

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In re LUCAS'S WILL.

legatees, therefore, *George* dying in the lifetime, his issue are substituted for him; and I cannot consider there is any intention that the substitution should not take place because the testatrix knew that he was dead when she made her will.

Solicitors for the surviving children: *T. White & Sons.*

Solicitors for the children of *George Webb*: *Twisden, Parker, & Co.*, agents for *Hearn & Langdon, Buckingham.*

Solicitor for other parties: *C. A. Emmet.*

C. M.

V.-C. M.
1881
Jan. 13, 19.

BLAND *v.* DAWES.

[1880 B. 01454.]

Will—"Sole use and disposal"—Separate Estate.

A legacy given to a married woman for her "sole use and disposal" vests in her as separate estate.

SPECIAL CASE.

Julia Baker, by her will, dated the 9th of August, 1866, made the following bequest:—"I give and bequeath to my dear niece, *Frances Sybell Bland*, for her sole use and disposal, five thousand pounds." The testatrix died on the 20th of November, 1866. At the date of the will *Frances S. Bland* was married to Archdeacon *Bland*. The personal estate of the testatrix not being sufficient to pay in full all the legacies given by the will, Mrs. *Bland* and her husband consented to receive the residue which should remain after payment of the other legacies; that sum amounted to £4127 1*s.* 11*d.* New 3 per Cent. Annuities, and £134 8*s.* 5*d.* cash which remained payable to them. The £134 8*s.* 5*d.* was paid by a cheque to Archdeacon *Bland*, accompanied by a letter from the sole executor, who proved the will, asking him into whose name Mrs. *Bland* wished the £4127 1*s.* 11*d.* stock to be transferred, and Archdeacon *Bland*, at the request of his wife, wrote in answer, saying that his wife wished it to be transferred into his name only, but that both principal and interest would be at her disposal. When the transfer was effected Archdeacon

Bland had other money of his own in the same stock, consequently the £4127 1*s.* 11*d.* was added to the previous account, the whole amount of which then became £7807 5*s.* 4*d.* Archdeacon *Bland* instructed his bankers, Messrs. *Barnetts*, to receive the dividends upon the whole sum, and to open a separate account in their books in the name of Mrs. *Bland*, and to place so much of the dividends as was attributable to the £4127 1*s.* 11*d.* to the credit of the separate account of Mrs. *Bland*, and to place the remainder of the dividends to his own account. These instructions were carried out by the bankers, and Mrs. *Bland* continued to receive her dividends until the death of Archdeacon *Bland*, which took place on the 17th of February, 1880. The archdeacon, by his will, after appointing the Plaintiff and the Defendant, *Richard Dawes*, executrix and executor of his will, directed them to stand possessed of the residue of his estate after payment of various legacies and debts, upon trust to invest the same, and to pay the income to his wife during her life or widowhood, and after her death or second marriage upon trust for the benefit of his nephews and nieces as therein mentioned.

The Plaintiff alleged that she was during the lifetime of her husband entitled to the £4127 1*s.* 11*d.* stock and the dividends thereof for her sole and separate use, and that her husband was a trustee for her, and that she was now entitled to have the said sum transferred into her name, and to have the dividends due thereon paid to her; but the Defendant alleged that doubts had been suggested as to the title of the Plaintiff to such transfer, and that he could not safely comply with the Plaintiff's request except under the direction of the Court.

The questions were whether, under the circumstances, the Plaintiff was entitled to have the sum of £4127 1*s.* 11*d.* New 3 per Cent. Annuities and the dividend due in respect thereof transferred and paid to her, or whether the said annuities and dividend formed part of the personal estate of the said Archdeacon *Bland*.

Speed, for the Plaintiff:—

The authorities upon this subject are very numerous, but they may all be summed up in this proposition,—that words must be

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used to shew an intention to exclude the right of the husband, as your Lordship said in *In re Peacock's Trusts* (1). There are, no doubt, cases in which the words "sole use" and benefit have been held to create a separate estate, as in *Ex parte Killick* (2) and *Adamson* v. *Armitage* (3), but it may be admitted that those cases have not always been supported by later decisions. There can be no doubt, however, that the words used in this will indirectly shew that the husband is not to have the control over the estate. These words are "for her sole use and disposal," and she could not have the disposal of the property without having it for her separate use, uncontrolled by her husband. The case of *Prichard* v. *Ames* (4) is conclusive in favour of the Plaintiff, and the words used there in a gift to a married woman "for her own use and at her own disposal" were held to vest the property in her for her separate use. The words "own sole use, benefit, and disposition" were held to have a similar meaning in *Ex parte Ray* (5).

Whitehorne, for the trustees:—

The precise words used in this will have never been held to constitute a separate estate, and the cases in which separate estate was passed by such words as "sole use," and "sole use and benefit," have long been superseded. In *Massy* v. *Rowen* (6) the whole law upon the subject is laid down, and it is there held that the words "separate use," which have a technical meaning, must be used, or words clearly implying the exclusion of the marital right. In *Tyler* v. *Lake* (7) the words were, "into their own proper and respective hands to and for their own use and benefit," and yet it was held that the property did not vest in the married women for their separate use. So in *Massey* v. *Parker* (8) the interest of a fund was given "for and under their sole control," and it was decided that these words did not indicate an intention to exclude the marital control. *Gilbert* v. *Lewis* (9) is to the same effect. Such cases as *Prichard* v. *Ames* belong to a group of authorities which have all been overruled.

(1) 10 Ch. D. 490.
(2) 3 M. D. & D. 480.
(3) 19 Ves. 416.
(4) T. & R. 222.
(5) 1 Madd. 199.
(6) Law Rep. 4 H. L. 288.
(7) 2 Russ. & My. 183.
(8) 2 My. & K. 174.
(9) 1 D. J. & S. 38. 9 Jur. N.S. 187

MALINS, V.C.:—

I quite adhere to what I said in *In re Peacock's Trusts* (1). "I think nobody will say that the authorities upon this subject stand on a very satisfactory footing . . . However, I think the result may be thus stated: that there must be in a will, or in any other instrument, an intention shewn that the wife shall take and that the husband shall not." In this case the testatrix made the following bequest: "I give and bequeath to my dear niece, *F. S. Bland*, for her sole use and disposal, five thousand pounds." Now I am bound to attribute to the testatrix the knowledge that if the money was not given to the separate use of her niece it would be under the control of her husband.

Assuming the rule to be as I have laid it down, two things must concur. First, an intention to benefit the wife, and, secondly, an intention to exclude the husband. By giving the money for the sole use of her niece, it is evident that her intention was to benefit her niece, and if the money is to be at her sole disposal, it evidently means that it is not to be at the disposal of her husband; or, in other words, to exclude the husband from having any control over it. I have a strong impression that wherever property is given to the "sole use" of a woman the intention is to give it to the separate use, because the word "sole" must mean one person, and it could not be enjoyed by one person if the husband had an interest in it; however the authorities are adverse to that view, and therefore it would not be in my power to decide that the word "sole" when used alone would confer separate estate, but here the words are "sole use and disposal," which must, I think, mean that she alone is to have the power to dispose of it, and that cannot be unless she has it separate from her husband. In my opinion, none of the authorities have interfered with the case of *Prichard* v. *Ames* (2). That was the decision of Baron *Graham* and Masters *Alexander* and *Cox*, sitting for the Master of the Rolls, all of whom were good lawyers. The words there were "for her own use and at her own disposal;" the meaning is precisely the same as these words, which are "for her sole use and disposal," although the words are not precisely the same. Baron *Graham*, in giving judgment, made this observation: "The testa-

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(1) 10 Ch. D. 490, 495.

(2) T. & R. 222.

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trix in using the words 'at her own disposal' has stated the effect she wished to be produced; her intention was to give the Plaintiff that power of disposition which the law does not give her. The words 'at her own disposal' must be altogether rejected, if they are taken to mean nothing more than 'for her own use.'"

Many authorities have been cited, but not one in which *Prichard* v. *Ames* (1) was discussed by the Judge. It was no doubt cited in *Massey* v. *Parker* (2), but not mentioned in the judgment. *Prichard* v. *Ames* being, in my opinion, a very strong case in support of my view, and there being no contrary authority to be found, I think this case is governed by that authority, and falls within the rule that there must be an intention shewn that the married woman shall have the sole benefit, and that her husband shall be excluded from any benefit. Therefore I answer the first question in the affirmative and the second in the negative.

Solicitor for Plaintiff and Defendant: *George Dawes.*

T. W. G.

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1881
Jan. 15, 22.

In re HARDY.
WELLS *v.* BORWICK.

[1877 H. 55.]

Will—Legacy to Wife—Priority.

A testator gave to his wife all his furniture and effects together with the sum of £500 to be paid to her immediately after his decease.

He also directed his trustees to raise out of his estate the sums of £12,000 and £5000, and invest the same and pay the interest of the £12,000 to his wife during her life, and the interest of the £5000 to his brother and sisters during their lives, and after the death of his wife, brother, and sisters, those sums were to fall into the residue of his estate. He then gave his brother and sisters legacies of £6000 and £2000, and gave other smaller legacies.

His estate proved insufficient for the payment in full of all the legacies:—

Held, that the legacy of £500 to the wife had priority over all the other pecuniary legacies:

Held, that the legacies of £12,000 and £5000 had priority over the other legacies.

Blower v. *Morret* (3) dissented from.

RICHARD HARDY, by his will, gave and bequeathed unto his wife, *Mary Ann Hardy*, "all my household goods and furniture, plate, linen, books, wearing apparel, horses, carriages, cattle, and other effects in or about my dwelling-house for her own use and benefit, together with the legacy or sum of five hundred pounds, which I direct to be paid to her immediately after my decease."

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(1) T. & R. 22. (2) 2 My. & K. 174. (3) 2 Ves. Sen. 420.

The testator then gave and bequeathed all his real estate and the residue of his personal estate to trustees upon trust to sell the same and to stand possessed of the proceeds "upon trust in the first place to raise and appropriate out of my said estate and effects the sum of twelve thousand pounds, and to invest the same at interest upon Government or real or leasehold securities, or railway debentures or debenture stock, or upon mortgage of the rates of any borough or district, but all such securities to be in *England*, with power from time to time to alter, vary, and transpose such securities for others of the like nature as to them my said trustees shall seem expedient; and upon trust to pay the dividends, interest, and annual income of the said sum of twelve thousand pounds to my said wife during her life. And in the next place to raise and appropriate out of my said estate and effects the sum of five thousand pounds, and to invest the same upon the securities hereinbefore mentioned; and upon trust to pay the dividends, interest, and annual produce of the sum of two thousand pounds, part thereof, unto my brother *Thomas Hardy* during his life: and to pay the dividends, interest, and annual produce of the sum of one thousand pounds, other part thereof, unto my sister *Catherine Hardy* during her life, and to pay the dividends, interest, and annual produce of the sum of two thousand pounds (residue of the said sum of five thousand pounds) unto my said sister *Elizabeth Philbrick*, or permit her to receive the same during her life. And from and after the respective deaths of my said wife, my said brother *Thomas Hardy*, and my said sisters *Catherine Hardy* and *Elizabeth Philbrick*, then I direct that the said sums of twelve thousand pounds and five thousand pounds shall respectively fall into and be divided with the residue of my estate as hereinafter mentioned. I give and bequeath unto my brother *James Hardy* the legacy of six thousand pounds, and unto my brother *John Hardy* the legacy of two thousand pounds, and unto my sister *Ann*, the wife of *Samuel Stockdale Armitage*,

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the legacy of two thousand pounds. All the residue and remainder of my estate and effects not hereinbefore disposed of I give and bequeath in manner following." The testator then gave the residue in fourths for the benefit of his brother and sisters. And he directed that until the said sums of £12,000, £1000, and £2000 should be set aside and invested as thereinbefore directed for the benefit of his wife and sisters, they should be paid interest at the rate of 4 per cent. on such sums respectively. By a codicil to his will the testator gave two legacies of £300 to friends, and several legacies of £100 and £55 to friends and to charities.

The testator died in 1876, and the executors paid the £500 legacy to the widow, but in consequence of the insolvency of one of his brothers, with whom the testator was in partnership, his estate proved insufficient for the payment of the legacies given by the will and codicil to the extent of about one-half.

An action was brought for the administration of his estate, in which a summons was taken out for the opinion of the Court—1. Whether the legacy of £500 given to his widow had priority over the other legacies; and, 2. whether the legacies of £12,000 and £5000 were to be raised and invested in priority to the other legacies given by the will and the codicil.

The question as to the £500 legacy was first argued.

J. Pearson, Q.C., and *Phipson Beale*, for the executors.

Glasse, Q.C., and *Northmore Lawrence*, for the other legatees:—

In *Blower* v. *Morret* (1) Lord *Hardwicke* decided that there was no priority. So in *Beeston* v. *Booth* (2), *Heath* v. *Dendy* (3), and *Thwaites* v. *Foreman* (4).

Bristowe, Q.C., and *Russell Roberts*, for the widow:—

In all these cases the question is what was the intention of the testator. *Lewin* v. *Lewin* (5), also by Lord *Hardwicke*, is the other way. In *Thwaites* v. *Foreman* there was no specific direction. Here the gift of the £500 is coupled with a bequest of specific legacies which must be given immediately.

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(1) 2 Ves. Sen. 420.
(2) 4 Madd. 161.
(3) 1 Russ. 543.
(4) 1 Coll. 409.
(5) 2 Ves. Sen. 415.

Cozens-Hardy, for another party.

Malins, V.C.:—

The question I have now to decide is whether under the will of *Richard Hardy* a legacy of £500 given to his wife has priority over the other legacies which are given to collateral relations. [His Lordship then read the words of the bequest.] It appears that the estate is insufficient for the payment in full of all the legacies, but this was occasioned by the insolvency of one of his brothers, and probably was not anticipated by the testator. He no doubt intended that his wife should not have to wait until it was ascertained whether there would be enough to pay all the legacies in full. The executors also thought that the estate would be sufficient, and paid the £500 to the widow, but they now ask that she may refund a part of it. But what did the testator intend? Can there be the least doubt that as she was immediately to have his household goods, she should immediately have £500 as the means of carrying on the household, and it is repugnant to every intention that she should wait until the state of the assets is ascertained. It appears to me clear that the testator intended this money to be at once paid to his widow, and that having been done, she cannot now be called upon to refund.

But it is said that I cannot decide in this way because 130 years ago Lord *Hardwicke* in a particular case decided that there was no priority. I think, however, that the cases are distinguishable, because here the pecuniary legacy is coupled with specific bequests. In that case, *Blower* v. *Morret* (1), a legacy of £500 was given to the widow, and the testator declared that it should be in full satisfaction of all dower or thirds. That again was a circumstance which gave her priority, and with the greatest respect for Lord *Hardwicke*, I dissent from that decision, and will not follow it unless I am obliged to do so by the Court of Appeal. I think that where a man leaves money to be paid to his wife immediately, she is not bound to wait until the executors can ascertain the state of the assets. In my opinion *Blower* v. *Morret* (1) is distinguishable in many respects, but if it is not, then I say I dissent from it and decline to follow it.

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(1) 2 Ves. Sen. 420.

I am of opinion that in this case the legacy of £500 to the widow has priority.

The question as to the priority of the legacies of £12,000 and £5000 was then argued.

J. Pearson, Q.C., and *Phipson Beale*, for the executors, and

Glasse, Q.C., and *Northmore Lawrence*, for other legatees, were stopped by the Court.

Bristowe, Q.C., and *Russell Roberts*, for Mrs. *Hardy*:—

No doubt the words "in the first place" alone give no priority, but the words of this will are enough to give priority to the legacy for the benefit of the widow. The testator has not merely given a series of legacies, but he has directed these two legacies to be raised, and then to fall back into the residue out of which the other legacies were to be paid. It is exactly like *Lewin* v. *Lewin* (2). A specific thing has to be first done, and then there is a gift over, as in *Brown* v. *Brown* (3). There is a broad distinction between a mere legacy and a trust to invest, and here the primary intention of the testator was to benefit his wife. No doubt the general rule is that there is no priority unless an intention to give it is shewn, but here it is shewn, as in *Haynes* v. *Haynes* (4), *Gyett* v. *Williams* (5), and *Pepper* v. *Bloomfield* (6). As to the £12,000 there can be no doubt, and the £5000 must follow it. The first case on the subject is *Brown* v. *Allen* (7).

Cozens-Hardy, for another party.

J. Pearson, in reply:—

It is impossible to consider the relative duties of a man to his

(1) 2 Ves. Sen. 420.
(2) Ibid. 415.
(3) 1 Keen, 275.
(4) 3 D. M. & G. 590.
(5) 2 J. & H. 429.
(6) 3 D. & War. 499.
(7) 1 Vern. 31.

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wife and his brothers in construing a will, and any priority must be clearly shewn on the will. It may be true that the law would be better if priority were more often inferred; but that is not the law as settled by decisions. As to the trust for investment, that is merely machinery, and no conveyancer supposes that by altering the machinery he alters the meaning of the will. It is clear that this testator intended all these legacies to be paid together. He cannot have intended his brothers and sisters to wait until these legacies fall into the residue. *Johnson* v. *Child* (1) was a much stronger case: *Miller* v. *Huddlestone* (2).

MALINS, V.C.:—

It is very likely that whichever way I may decide this case it will not be final, and therefore I think it better for the parties that I should give judgment at once, in order that they may go elsewhere if they desire. It is, I think, a case of extreme nicety and doubt, and therefore in giving the opinion which I am about to do, I am not to be understood as entertaining it very strongly, and for the reasons I am about to state.

This is a question on the construction of the will of *Richard Hardy*, and the general principles upon which the case must be decided are not in question. One general principle is, that every testator in making gifts by his will—not specific gifts, but general gifts or legacies—must be considered as entertaining the notion that his assets will be sufficient to pay all in full, unless he shews to the contrary. This is also clear on the authorities, particularly *Beeston* v. *Booth* (3) and *Thwaites* v. *Foreman* (4), that the gift of, first, a legacy to *A.*, secondly, a legacy to *B.*, and thirdly, a legacy to *C.*, or a direction that one legacy shall be paid at one period, and another legacy paid at another period, does not create any priority between the legatees. Therefore the question in every case is whether the testator has by his will shewn an intention to give priority to a particular legacy. If he says expressly that it is to have priority, there is an end to the question; but if he has not given any express direction on the subject, the intention must be collected from the whole frame of

(1) 4 Hare, 87.
(2) 3 Mac. & G. 513.
(3) 4 Madd. 161.
(4) 1 Coll. 409.

the will, and from what is to be presumed to be the object of the testator.

Although the Court is bound by decisions on other wills, it has often been said that a decision upon one will can hardly be a guide for another will, in which the words are different, and from which a different intention may be collected. And however right I may think it to be, that if possible these two legacies of £12,000 and £5000, or rather the legacy of £12,000 in particular (for that is the one to which the argument has been addressed), should have priority, I am not at liberty to give it that priority, unless upon the whole will I can collect that it would have been the testator's intention to do so if it turned out that the assets were insufficient.

This is the will of *Richard Hardy*, who was a lace manufacturer at *Nottingham*. The statement has been made, and is, I believe, agreed upon on both sides, that he was a man, at the time of making his will, of very considerable wealth, and that he would have been a man of very considerable wealth at the time of his death if it had not been for a loss he sustained in his partnership through one of his brothers. No doubt, therefore, when he made his will, he expected that he would leave enough to pay everything, and leave besides a residue, which he has given to his brother and sisters. It turning out that the assets are insufficient, the question is whether, upon the whole will, I can collect that it would have been the intention of the testator, as expressed in the will, to give a legacy, of which the wife is tenant for life, priority, or that her legacy should be cut down if his assets failed. His assets might not have been sufficient to pay 5*s.* in the pound, and in that case was it his intention that she should only have a dividend in common with all the other legatees, the collateral relatives, and the charity legatees, because, if the argument against priority prevails, even the charity legatees must come in *pari passu* with the widow, as well as with all the collateral relatives? In order, therefore, to arrive at a conclusion, very careful attention to the terms of the will is required. [His Lordship then read the clause.]

Now, are those legacies of £12,000 and £5000 to be treated as general legacies in all respects, because if they are then there is to be no interest on them till the expiration of one year after the death of the testator? Has he shewn any intention to give them an advantage which does not belong to any other legacies? He says here, "And I further declare that until the said several sums of £12,000, £1000, and £2000 shall be set aside and invested as hereinbefore directed for the benefit of my said wife and my said sisters *Catherine Hardy* and *Elizabeth Philbrick,* they shall from the time of my decease be paid interest at the rate of £4 per cent. per annum." Now, I think that is one indication that he intended these legacies to be in a different position from the others. There is sufficient, in my opinion, in the general frame of the will to reasonably satisfy my mind—I will not say beyond all possibility of doubt, but reasonably—that although he had not thought it necessary to provide for it in express words, yet if he had known how the state of his assets would turn out to be, he would have performed that which was his manifest duty, namely, to provide that his wife should be in the first instance taken care of, and that collateral relatives should only come in after her.

I quite agree with the argument that the words "in the first place" and "in the second place," and so forth, would not have the effect of giving priority, as decided in *Beeston* v. *Booth* (1); but the money here is to be invested in particular securities, and it has been decided that where money was directed to be taken out and invested in land, it shewed an intention to give priority. I can see no distinction between investing in land and investing in any other securities, and therefore the circumstance that it is to be taken out and invested in a particular manner is, in my opinion, an indication of an intention to give priority. Although the rules laid down by Lord *Hardwicke* in the case of *Lewin* v. *Lewin* (2) have been much commented upon, yet they have never been dissented from. The question there was whether the widow was entitled to priority for her annuity, and the legacy here is virtually an annuity. [His Lordship read the judgment.] There Lord *Hardwicke* said it was a strong case for priority, as it was natural that the wife and children of the testator should have their legacies out of his estate before the gifts to strangers, and the Court must presume that that was his intention. I must say that I follow that reasoning entirely. I do not follow the reasoning of Lord *Hardwicke* in *Blower* v. *Morret* (3), where he did not give priority to the wife as to a legacy to be paid imme-

(1) 4 Madd. 161.

(2) 2 Ves. Sen. 415.

(3) 2 Ves. Sen. 420.

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diately after the death of the testator. *Brown* v. *Brown* (1) is also in favour of the same construction, although I am bound to say that the circumstances there were more favourable to priority than they are in this case. There Lord *Langdale* said (2), "If the testator had contemplated that all his legacies would be at once satisfied, it would have been unnecessary to direct that the two legacies in question should be applicable after the decease of the legatees to the payment of the legacies given by his will. He cannot be reasonably presumed to have contemplated, as has been suggested at the Bar, the death of the three legatees to whom these two legacies are given, within a twelvemonth after his decease . . . . There is no way therefore in which effect can be given to the words used by the testator but by giving a priority to these two legacies." The case of *Gyett* v. *Williams* (3) has been relied upon by both sides. There the Vice-Chancellor Sir *W. P. Wood* said, "When a man directs £2000 to be laid out in purchasing an estate, and then after disposing of that estate directs that the residue of his personal estate is to be invested and portioned out in a particular way, what is it that he gives by this last disposition? Clearly nothing except the residue so to be invested after payment of the £2000." I think this case in principle is exceedingly like that case, but every case depends upon the particular language of the will, and I cannot extract any general rule from the cases. Upon the whole I come to the conclusion that there is such a marked distinction between the legacies in which life interests only are given, and those in which the *corpus* is absolutely given, that the effect of the will is to give priority to the £12,000 and the £5000, and I must therefore declare that they have priority over the general legacies given by the will.

His Lordship afterwards said that as between themselves the legacies of £12,000 and £5000 stood upon the same footing, and that they came after the £500 legacy.

Solicitors for executors: *Torr & Co.*
Solicitor for widow: *F. Needham.*
Solicitors for other legatees: *Field, Roscoe, & Co.*

(1) 1 Keen, 275. (2) 1 Keen, 278. (3) 2 J. & H. 429, 440.

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In re ALLAN.

[1880 A. 27.]

V. C. M.

1880

July 31.

1881

Jan. 29.

Accumulations for Twenty-one Years—Tenant for Life—Infants in Remainder—Allowance for Benefit of Infants.

19 Ch D 30

A testator left property to the value of £10,000 a year to be accumulated for twenty-one years, and directed the accumulations to be laid out in the purchase of land, to be then held in trust for Sir *H. Havelock* for life, and afterwards for his eldest son for life and his first and other sons in tail, with a similar trust for Sir *H. Havelock*'s second son and his issue, with subsequent limitations over:—

Held, that as Sir *H. Havelock* was possessed of a moderate income only, which was insufficient for the maintenance and education of his sons, to fit them for their prospective positions in life, a sum of £2700 per annum should be allowed him for the benefit of the infants.

THIS was an action for the administration of the estate of the late *Robert Henry Allan*, and the case now came on as an adjourned summons upon the application of the two infant Plaintiffs by their next friend, that an allowance might be made out of the rents and profits directed to be accumulated, to Sir *Henry M. Havelock-Allan*, the father of the Plaintiffs, for their maintenance and education.

The testator, *Robert Henry Allan*, by his will, dated the 8th of January, 1879, after making various specific bequests and legacies, including a legacy of £2000 to his wife *Elizabeth Allan*, and, after directing the interest of a sum of £40,000 bank annuities to be paid to his wife for her life or widowhood, which was afterwards to fall into the residue, gave and devised his mansion called *Blackwell Hall*, and the surrounding lands containing thirty-seven acres, to his wife for life, and he devised his freehold estate called *Blackwell Grange*, to his brother *George Thomas Allan* for life, and, subject to the devises before contained, he gave and devised all his real and leasehold estates, which, with his personal estate, he described as amounting in value to at least £500,000, for the benefit of his cousin Sir *Henry Marshman Havelock*, whom he

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described as a major-general in the army, and the brave, pious, and high-minded son of the illustrious soldier Sir *Henry Havelock*, in manner thereinafter mentioned. He then gave his mansion called *Blackwell Hall*, after the death of his wife, to Sir *Henry Havelock* for life, he keeping the same in good repair and condition, and he gave and devised his mansion called *Blackwell Grange*, with the lands surrounding containing about eighty-one acres, in the event of the death of his brother *George Thomas Allan* without issue male, to the use of Sir *H. Havelock* for life; and he also gave and devised his *Newton Grange* estate to the use of Sir *H. Havelock* for life, and, subject to the devises before contained, he devised the whole of his real and leasehold estates to his trustees, Sir *Henry Havelock*, *Arthur Lucas*, and *Edward Hutchinson*, and their heirs, executors, administrators, and assigns, upon trust to receive the rents and profits for and during twenty-one years from the time of his decease, and to lay out and invest the same in the purchase of freehold, copyhold, or leasehold lands and hereditaments in the county of *Durham* or in the *North Riding* of the county of *York*, to be held upon the trusts expressed concerning the freehold and leasehold estates thereby devised. And, after the expiration of the twenty-one years, upon trust to permit Sir *Henry Havelock* to receive the rents and profits of his real and leasehold estates for life, and after his decease, upon trust for *Henry Spencer Havelock*, the eldest son of Sir *Henry Havelock*, for life, and after his decease, upon trust for the first and every other son of *Henry Spencer Havelock* in tail male, and for default of such issue, in trust for *Allan Havelock*, the second son of Sir *Henry Havelock*, for life, and after his decease, for his first and every other son in tail male, and for default of such issue, upon trust for the third and every other son of Sir *Henry Havelock* in tail male, and for default of such issue, upon trust for the first and other sons of the late *Joshua Havelock* in tail male, and for default of such issue, upon trust for the right heirs of the late Lieutenant-Colonel *William Havelock*, a brother of Sir *Henry Havelock*; and the testator gave and bequeathed all the residue of his personal estate to his trustees to convert the same into money and invest the proceeds in the purchase of freehold, copyhold, or leasehold lands and hereditaments, to be held upon the trusts thereinbefore expressed concerning his real and leasehold estates. The testator then directed that every person who should for the time being be entitled to any estate under his will, should assume and bear the name and arms of *Allan*, and upon failure to comply with this clause such person should forfeit the estate to which he should be entitled. And the testator appointed his wife *Elizabeth Allan*, and the Defendants Sir *H. Havelock*, *Arthur Lucas*, and *E. Hutchinson*, executrix and executors of his will.

By a codicil to his will the testator imposed a condition of forfeiture on any beneficiary who should dispute the validity of his will or of any disposition therein contained, or should be a party to any proceeding by means whereof any interest would be attainable by such beneficiary of larger extent or value than was by the will intended for him.

The testator died on the 28th of October, 1879. The annual value of his property was upwards of £10,000. The testator's widow was still alive, and so also was his brother, *George Thomas Allan*, whose age was seventy-five, and he had no issue. Sir *Henry Havelock's* eldest son, *Henry Spencer Havelock*, was born on the 30th of January, 1872, and his second and youngest son was born on the 29th of March, 1874. He had also a daughter twelve years of age, and no other issue. The eldest son of the late *Joshua Havelock* was the Defendant *Henry Havelock*, who was born on the 15th of January, 1860, and consequently attained his age of twenty-one in January, 1881.

There was an affidavit by Sir *Henry Havelock*, who had taken the name of *Allan* in addition to his own surname, that his income was not sufficient to support and educate his two sons in a manner calculated to fit them for the position of wealth to which they were destined, and he stated that the testator had been misinformed as to the amount of his income, and he believed that if he had known the very moderate state of his finances he would not have left him without any provision until after the expiration of twenty-one years. He therefore asked the Court to sanction an allowance to himself, out of the annual income of the estate, for the maintenance and education of his infant sons, to the amount of £2700 per annum.

The application was sanctioned by the guardian of the infants

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and their legal advisers, and was not opposed by the trustees of the will, or by the eldest son of *Joshua Havelock.*

J. Pearson, Q.C., and *Vaughan Hawkins*, for the infants:—

There can be no question about the propriety of this application, and everyone must admit that it is most desirable that a handsome allowance should be made to Sir *Havelock-Allan* out of the rents for the bringing up of the children, and the support of an establishment equal to the future expectations of the family. The only question is whether the Court has power to do what is manifestly for the advantage of the infants and of their father. Here is a dry accumulation directed for twenty-one years, the utmost time allowed by law, and the only purposes for which the accumulations are to be applied are the acquisition of more land. The estate now produces about £10,000 a year, and Sir *Henry Havelock-Allan*, the person whom the testator desired to benefit, and for whom he expresses so much regard and affection, is to be left without any of the rents for twenty-one years. He is now between fifty-one and fifty-two years of age, consequently he will get nothing till he is seventy-two years of age, and his eldest son, a boy of nine years of age, who was quite unknown to the testator, will come in for this enormous property. We say that the testator has left to the trustees a wide discretion as to the payment of outgoings and repairs, and the doing of many things which must require a large outlay. This outlay ought to include what may be necessary for the maintenance and education of the objects of the testator's bounty. The Courts have always set their faces against these long accumulations, and there are authorities which fully warrant this application. The case of *Bennett* v. *Wyndham* (1) is a complete authority in support of our contention, where the rents of a large estate were directed to be accumulated for paying off incumbrances; and considerable annual sums were allowed by way of maintenance, and these sums were increased from time to time as they were required. In *Revel* v. *Watkinson* (2) it was held that, although a tenant for life was bound to keep down the interest upon incumbrances, and the whole income of the estate was required for that purpose, still the Court would direct a reasonable maintenance for the tenant for life out of the profits. The same principle was established in *Burges* v. *Mawbey* (1) and in *Greenwell* v. *Greenwell* (2), and in the last case the Court considered that it had power of itself to judge what was for the benefit of the infants. Then it was decided in *Aveline* v. *Melhuish* (3) that where a will contains an express direction to accumulate, and no power of maintenance, that is not a ground for charging the trustees with sums paid by them for maintenance.

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(1) 23 Beav. 521; 4 D. F. & J. 259.

3 Jur. N.S. 1143

(2) 1 Ves. Sen. 93.

Bristowe, Q.C., and *Romer*, for Sir *Henry Havelock-Allan*, in support of the application.

Locock Webb, Q.C., and *Stallard*, for the eldest son of *Joshua Havelock*, who would be entitled to the estates in case of failure of issue of Sir *Henry Havelock-Allan*, raised no objection to the application.

Whitehorne, for the trustees, approved of an allowance being made for the children to their father, and submitted to the direction of the Court.

1881. Jan. 29. MALINS, V.C.:—

This case involves important principles, and it is, I think, in its particular circumstances entirely novel.

The testator, *Robert Henry Allan*, by his will, dated January, 1879, after making certain provisions for his widow and members of his family, which it is not necessary now to enter on, gives all his real estate and his personal estate to trustees upon trust to accumulate for twenty-one years from the day of his death, which is the utmost period the law will permit, and he then gives his real estate and all the estates which are to be acquired under the accumulation to the present Sir *Henry Havelock* for life, with remainder to the eldest son of Sir *Henry Havelock* for life, with remainder to his issue in tail by purchase, with remainder to the second son of Sir *Henry Havelock*, who was also living at the date of the will, for life, with remainder to his issue by purchase, with remainder to the future born sons of Sir *Henry Havelock* in tail, then with remainder over to the eldest son of Colonel *Joshua Havelock* in tail. The matter stands thus: Sir *Henry Havelock* is now, I understand, of the age of about fifty-one or fifty-two. He has two sons living—one of them is nine years of age and the other seven. Sir *Henry Havelock*, therefore, if the period of twenty-one years had now expired, would be tenant for life in possession of these estates, which are of the value of about £10,200 a year without any accumulations. The only persons *in esse* under the limitations are Sir *Henry Havelock* himself and his two sons and the eldest son of *Joshua Havelock*—all other persons who may become interested are unborn.

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(1) T. & R. 167.

(2) 5 Ves. 194.

(3) 10 Jur. (N.S.) 788.

Now I have before me this statement of facts, which is admitted on all hands. Sir *Henry Havelock* is a major-general in the army, and he has the income of a soldier of his rank. Certainly he has married a sister of Lord *Ducie*, who, of course, has a portion, but his income altogether is of a very moderate amount, having reference to his position in life and with the expectation that either he or his children at all events will, in all human probability, come into possession of these estates. He is also in Parliament, which necessitates further expenses. Therefore, Sir *Henry Havelock* having, for his position in life, very inadequate means, and having these great expectations for himself or his family, and seeing, even if I grant this application, that there is an estate of more than £10,000 a year out of which the allowances are asked to be made, which would still leave a very large accumulation to go on for about nineteen years longer.

Under these circumstances, am I at liberty to act upon what I consider for the benefit of the family—not only for Sir *Henry Havelock* himself, but for the benefit of his children, on whose behalf this application is made? The application by the children is that, they having these expectations, it is for their benefit that their father, their natural and lawful guardian, should have ample means, while they are under age, or while this period of nineteen years passes, for educating them, as they must necessarily be educated, in an expensive manner, with a view to the expectations they have. They must go to a public school and afterwards to college, and all these things are very expensive, and it is impossible for Sir *Henry Havelock* with his present means to meet them. Now if I am to decide this question on what is best for the interests of the infants, I should have no hesitation whatever in coming to the conclusion that it is much more for their benefit that the father should have the means he asks in order to educate them properly, and to keep up the family residence in a manner suitable for their condition and rank in life, than that he should be living in comparative poverty —I do not mean absolute want, but comparative poverty. As a matter of expediency, therefore, and good feeling and propriety, I cannot see how any man possessed of a fortune such as this testator had should have been advised or allowed to make such a will; for I cannot help thinking, considering the terms of affection which he expresses in this will for and the high character and position of Sir *Henry* himself, whom he describes as the worthy son of his illustrious and distinguished father, there is quite sufficient to shew that he had great regard for Sir *Henry Havelock*, and that his well-being was in point of fact the great object he had in view in making this will. It appears that the testator was under the impression that Sir *Henry Havelock* had a considerable fortune. I have no doubt of it, for it is the only way you can account for his making his will in the terms he did, therefore I believe it would have been the intention of the testator, if his attention was called to the fact and he knew the true state of facts, to have done what I am asked to do. I am perfectly satisfied it is for the interests of the family that it should be done, and I am glad to find that the first tenant in tail, the eldest son of *Joshua Havelock*, being now of full age, having attained his majority on the 15th of this month, has expressed his approval of what I am about to do.

The persons immediately affected will be the sons of Sir *Henry Havelock*. They are my wards, and I think, therefore, I am warranted in doing what I think best for their benefit, particularly as it is sanctioned by the guardian and sanctioned by the solicitor and sanctioned by the counsel. Therefore I have everything here I can have to induce me to do that which I am satisfied is for the benefit of the infants and all parties concerned.

Now, therefore, having I believe in common with all mankind, certainly in common with all Judges, and, I believe, all counsel of

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experience, a very strong feeling that nothing can be more inexpedient than these dry accumulations of property, which render property for twenty-one years useless to everybody, instead of being enjoyed by those who are in existence and who may want it, as in the present case, I should always discourage them and cut them down as much as possible. However, I am bound to take the law as it is, and if I found myself bound by decisions that these dry accumulations directed by testators must go on, happen what may, although those who are ultimately to enjoy the property may be left destitute in the interval, if that had been the current of the decisions, I should have been bound to refuse the present application. But I find that is not the current of decisions. On the former occasion when the matter was before me, on the 31st of July last, the case of *Bennett* v. *Wyndham* (1) was referred to, not so fully as to-day, nor had I such full information on it as I have at present, because Mr. *Pearson* has now handed up a complete account of all the proceedings in the case, and what was done was this: Mr. *Bennett*, the testator, had been in the possession of large estates, and there were heavy mortgages on them. I think at the time of his death the incumbrances were reduced to £38,000 by the employment of his own personal estate, but the gross amount of the income was £6000 a year, and under these circumstances "he devised his residuary real estate to trustees in fee, 'upon trust by and out of the rents, issues, and profits thereof to pay' the annuities of £300 and £186 to his daughters (from the payment of which he exonerated his personal estate), and by the same ways and means or by such other ways and means (except a sale or sales) as they may think proper," to apply all the rents and profits in paying off the mortgages. Therefore it was not until these mortgages were paid off, and subject thereto, that the property was given under limitations, amongst others, to his grandson *Vere Fane Bennett*, who afterwards married a lady named *Stanford*, who was possessed of very large fortune. Now there was no provision for his maintenance. But for the trust for accumulation he would have been tenant for life in possession of the estate, and an application was made to the Court, and the result was that notwithstanding this direction, which is virtually

(1) 23 Beav. 521. 5 Jur NS. 1143

a direction to accumulate, that is, a direction to apply all the rents and profits in reducing the mortgages—notwithstanding that the Master of the Rolls, Lord *Romilly*, made an order to allow a certain sum for his maintenance: and his Lordship, on the 13th of March, 1857, directed an inquiry what part of the rents should be applied to pay off the charges, and what part of the residue should be allowed to the tenant for life, and then, by an order of the 7th of July, 1858, it was ordered that £1190 should be allowed to *Arthur Fane*, the plaintiff's father, for his past maintenance to the 29th of April, 1857, and £580 annually from that time during minority, or until further order. Therefore there was taken out of this fund directed to be accumulated, or what is precisely the same thing, to be applied in paying debts and mortgages, £1190 for the past maintenance and £580 for the future maintenance. The amount is immaterial, because if the trust to accumulate is to be observed literally, you can no more take £1 than £1000: directly you do that you trench on the accumulated fund. But it did not stop at £580, because the matter came before the Court again, and the Master of the Rolls, on further consideration, in July, 1859, decided that the plaintiff was entitled to timber on the estates. Then in 1860 the plaintiff came of age. Now, although he came of age, his position was no better, because it was not until the mortgages were paid off that he was entitled to possession, and on a petition being presented, he being of age, that allowance of £580 was increased to £1300 a year, and on the 7th of December, 1867, being about to marry Miss *Stanford*, in order that he might not be dependent on her, as he otherwise might have been if no allowance was made, the order was that the allowance should be increased to £1800 a year, with leave to reside at *Rythouse;* and £1500 was also given him out of the fund as an outfit on his marriage. The matter went to the Court of Appeal (1), and the result was that the scheme was affirmed.

Now, is that a case like the present? This is a direction to accumulate, and out of the accumulation to buy more land. That was a direction to accumulate to relieve the existing state of incumbrances, which incumbrances must at last have been paid

(1) 4 D. F. & J. 259.

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out of the *corpus* of the estate if it had not been for this direction, and being paid out of the *corpus* of the estate it could only be done by a sale of a portion, and therefore that would have been a diminution of the estate. In one case it was to prevent a diminution of the estate, and in this case it is to increase the estate. Now, between a trust to prevent the diminution of an estate and a trust to increase an estate, in principle, in my opinion, there would be no difference, and, therefore, what was done in *Bennett* v. *Wyndham* (1) is, I think, a precedent for what may be done in the present case.

But it does not rest merely on that authority; because the other authorities cited to-day go upon the same principle; and particularly the case before Lord *Hardwicke* of *Revel* v. *Watkins* (2), where the trust was for a daughter; and there was a trust to apply all the rents and profits in paying off the incumbrances, and the interest of the incumbrances alone exhausted the whole income. What was to be done under these circumstances? If it was strictly adhered to, the daughter, who was to come into possession of the estate, was left unprovided for, without any income; and Lord *Hardwicke* says (3): "But then the daughter must be allowed maintenance out of this trust estate during the mother's life, for she stands entirely in the light of a child unprovided for during that time and at the mother's pleasure; and the Court will not in favour of a remainderman suffer all the surplus profits to be exhausted to discharge the interest in exoneration of the estate, and leave a daughter and heir-at-law to starve; for which I can cite no stronger case than that of *Butler* v. *Woodhall*, before Lord *Harcourt*, where, though it was in the case of a surplus and all the profits of the estate devised subject to the trusts for payment of debts, yet the Court held the uncle could not intend his nephew to starve, and directed a reasonable maintenance to be made him out of the profits, it appearing that the creditors were safe in submitting to it." And I do not think, as I have already pointed out in this case, that Sir *Henry Havelock* has an income sufficient for the duties imposed upon him. Now, suppose Sir *Henry Havelock's* father had left him nothing, and he had married a lady without fortune, and he had nothing but his pay as Major-

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(1) 23 Beav. 521. (2) 1 Ves. Sen. 93. (3) 1 Ves. Sen. 95.

3 Jur NS 1163

General; then the observation of Lord *Hardwicke* on that case would be applicable to this: "Yet the Court held the uncle could not intend his nephew should starve, and directed a reasonable maintenance to be paid him out of the profits." I am quite certain this testator could not have intended that Sir *Henry Havelock* should lead a life, for twenty years after his death, of comparative penury for the sake of accumulating larger estates and of benefiting he knew not whom—it may have been a grandson of Sir *Henry Havelock* who had not come into existence. His expressed intention was that his family should be better off, and to benefit that family it would be necessary that Sir *Henry Havelock* should be provided for, and should have the means of bringing up and educating his family in a position suitable to their rank and position in life.

I do not think there is any other case that goes directly to the point; but all that has been said in the other cases favours the view I take. There is a case of *Greenwell* v. *Greenwell* (1), in which Lord *Loughborough* says: "The order of Lord *Thurlow* in that case is exactly to the same effect, and under the same circumstances as in *Cavendish* v. *Mercer;* taking the consent of the persons who would be ultimately entitled in the event of the death of all the children. I think myself sufficiently warranted to make the decree you pray, and there is no occasion for a reference. I judge that it is for the benefit of the children. I must direct the Master to settle what is proper to be allowed for the maintenance for the time past since the death of the testator and for the time to come, and to appoint a guardian." Then there is that passage in *Burgess* v. *Mawbey* (2), in which Sir *Thomas Plumer* seems to act on the same principle, and in which he says, "Generally speaking, therefore, it is perfectly clear that the tenant for life is bound to keep down the interest;" and further on he says: "It is perfectly clear that the heir-at-law not otherwise provided for is, as against the remainderman, entitled to a provision, but it is not stated in any part of the pleadings that Sir *Joseph Mawbey* the son was unprovided for, nor is there the least shadow of a ground even for an inquiry as to that point." I think there is no other case except *Aveline* v. *Melhuish* (3) going to

(1) 5 Ves. 194. (2) T. & R. 174. (3) 10 Jur. (N.S.) 788.

the point. There it was a direction to accumulate for the benefit of the daughters who should attain twenty-one, there being several daughters, and if any one attained twenty-one the whole fund to be vested. There the trustee had without express authority applied a large portion of the income for maintenance, and the question was, on taking the accounts, whether he was to be charged with the sum he so applied, and it was decided by the Court of Appeal that he was not to be so charged, but that it was a proper application.

All these cases proceed, it seems to me, on the same principle, and although the particular case I have now before me of taking a portion of the fund directed to be accumulated for twenty-one years has not before occurred, I consider that in substance it has been involved in these cases, and particularly in *Bennett* v. *Wyndham* (1). And it being, in my opinion, for the very best interests of Sir *Henry Havelock-Allan*, and greatly for the benefit of his children present and future, and greatly for the benefit of all who may come into possession of this estate, I without any difficulty or hesitation accede to the application that there shall be paid to Sir *Henry Havelock-Allan* until further order the annual sum of £2700. He has already under an order received £1500; therefore he will receive at the rate of £2700 a year from the death of the testator, giving credit for the £1500 he has already received, and for the future the trustees will be directed to pay to him by quarterly payments £2700 a year. I believe that is all that is asked. I will also add liberty to apply for an increased allowance if and when it may be necessary; as the children grow older they will probably require a larger expenditure. The costs of all parties between solicitor and client to be paid by the trustees out of the rents.

Solicitors: *Farrer, Ouvry, & Co.*; *R. T. Jarvis*; *Duncan, Warren, & Gardner.*

T. W. G.

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(1) 23 Beav. 521. 3 Jur N.S. 1143

In re PRINGLE.
WALKER *v.* STEWART.

V.-C. H.
1881
June 18.

[1880 P. 2027.]

Will—Construction—Bequest of "all the rest of my Money however invested"—Residuary Gift.

A testatrix, by her will, after giving a pecuniary legacy and bequeathing furniture, leaseholds, and dock shares, gave "all the rest of her money however invested" to her nephew *R. J. F.* "under deduction of £50 to be paid to each of her executors." She then gave a number of specified articles, such as ornaments, plate, pictures, and house linen, to various other nephews and nieces, and appointed executors:—

Held, that the gift to *R. J. F.* was a general residuary gift, and included the furniture, leaseholds, and dock shares, the bequest of which had lapsed.

CECILIA PRINGLE, by her will, dated the 19th of September, 1866, gave as follows: "To my sister Mrs. *Thomas Walker,* residing at present in *Hamilton, Upper Canada,* £600 sterling, or should she die before me her daughters are to have £200 each of the same, and the remainder is to be equally divided amongst her sons, or if any of the preceding legatees die before me leaving children, the children are to have what would have belonged to the parents as their share; my clothes to be equally divided between Mrs. *Walker's* children. I give and devise to my niece *Madeline Cecilia Maunsell* my share of the house and furniture in 13, *Canterbury Road,* and my shares in the *East and West India Docks,* and the brooch her mother gave me, all to her and her heirs for ever, and exclusive of the control of her present or any future husband. I give all the rest of my money however invested to my nephew *Robert John Foley,* presently residing in *New Zealand,* under deduction of £50 to be paid to each of my executors after named. I give to my niece *Mary Lawson,* presently residing in *Edinburgh,* my pink topaz brooch, her father's marriage gift to me, and likeness of Mr. *Matheson.* I give to my niece *Elizabeth Stewart* all my torquoise and gold ornaments, Irish diamond brooch, plated bread-basket, likeness of her aunt *Walker,* and oil painting of a view on the *Tagus* by Sir *S. Hawker.* I give to my nephew *Robert Stewart* the likeness of his mother, drawing-room clock, solid silver salver which belonged to my mother, and plated bottle-stands. I give to my nephew *David Pringle* my share of the portraits of his grandfather and uncle; all the rest of my plate to be equally divided between all my nephews and nieces in *Scotland* or *England* at the time of my death. I give my house linen to be divided between *Robert* and *Elizabeth Stewart.* I give my watch and chain to *Annie Isabella Foley,* and my bracelet of my sister *Isabella's* hair, with Indian clasps and Indian ring, to Mrs. *Foley.* I give my Indian earrings to my niece Mrs. *John Cowie,* and I hereby appoint *Robert Stewart* and *David Pringle,* my nephews, to be executors of this my last will."

The testatrix in July, 1870, made a codicil to her will in the following terms: "I have to add to the above will that all I leave to my nephew *Robert John Foley* is in life-rent to himself in trust and reversion to his children, to be divided equally amongst them."

Caroline Cecilia Maunsell died in the lifetime of the testatrix, so that the specific bequests to her lapsed.

The testatrix died on the 21st of June, 1880. At the date of her will she was, in addition to the effects specifically mentioned in it, possessed of a small sum of cash, of a sum of £612 10*s.* Consolidated Stock of the *Glasgow, Garnkirk, and Coatbridge Railway Company,* and of a sum of £208 *East and West India Dock* Stock; and she was also entitled under the will of *Isabella Atkinson* to a moiety of her residuary real and personal estates, which subsequently realized about £1489 1*s.*, and was invested by the testatrix before the date of the codicil in *Madras* railway stock. At the date of her death her property consisted of (1) a sum of £51 3*s.* 4*d.* cash in a bank; (2) a moiety of the furniture and effects at her residence, 13, *Canterbury Road, Croydon,* valued at £38 18*s.* 9*d.*; (3) a moiety of the leasehold interest in No. 13, *Canterbury Road;* (4) the said sum of £208 *East and West India Dock Stock;* (5) £1400 *Madras* railway stock; and (6) £1218 2*s.* 2*d.* *Caledonian Railway* 4 per Cent. Guaranteed Stock, into which the *Glasgow, Garnkirk, and Coatbridge Railway* Stock had been converted.

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The question then arose whether the gift in the will of "all the rest of my money however invested" was a general residuary bequest, so as to include the cash at the bank, and the furniture and effects, leasehold interest, and dock stock bequeathed to Mrs. *Maunsell*, as well as the railway stock; or was a specific bequest only of the money investments of the testatrix as they existed either at the date of her will or at the time of her death, so that the property comprised in the lapsed bequest would be undisposed of. This action was accordingly brought by the children of Mrs. *Thomas Walker* (whose mother had died in the lifetime of the testatrix), against the executors of the will and against *John Foley* and his children, in order to have the true construction of the will and the rights of the parties interested thereunder declared, and the personal estate of the testatrix administered by and under the direction of the Court.

Certain of the next of kin of the testatrix were not parties to the actions, and accordingly the Court at the hearing, under Rules of Court, Order XVI., rule 9, authorized the executors (who were themselves two of the next of kin) to defend the action on behalf of the absent next of kin.

Northmore Lawrence, for the Plaintiffs, stated the case to the Court.

Eddis, Q.C., for *John Foley* and his children:—

Although a simple bequest of "money" will not of itself pass stock and other personal estate, yet that word may be so used in a will as from the whole context to shew an intention that it should do so; in which case the Court will give effect to the intention, and construe the bequest as a general residuary bequest. Thus, in *Dowson* v. *Gaskoin* (1), the words "whatever remains of money" were held to refer to the general residuary personal estate of the testatrix; and in *Williams* v. *Williams* (2) your Lordship construed a gift in a codicil of "all moneys that may be left after my decease" as a general residuary bequest; and the decision of the Court of Appeal was only that those words in the codicil were not a sufficient revocation of a general residuary bequest contained

(1) 2 Keen, 14.

(2) 8 Ch. D. 789.

in the will. In the present case, however, the words are not "all the rest of my money" merely, but "all the rest of my money however invested," to which words effect must be given, and, moreover, it is "under deduction" of a legacy to each of the executors, which shews clearly that it is a general residuary bequest. But if it is not a good residuary gift, it at all events comprises all the stock of which the testatrix was possessed at the time of her death: *Dowson* v. *Gaskoin* (1).

Caldecott, for the executors and the next of kin of the testatrix:—

There is no case in which, without a sufficient context, a gift of "all my money," or "all the rest of my money," has been held to amount to a general residuary bequest, and there is no sufficient context here. The words are, moreover, "however invested," which will not pass the cash, nor the furniture, nor the leasehold interest, nor the stock, nor anything which was not money on some species of security at the date of the will, and such words have never been held to amount to a residuary gift. In *Stooke* v. *Stooke* (2) (which is nearly on all fours with the present case), where a testator gave a house and £300 "of lawful money" to his daughter, and "the remainder of all his moneys, whatever it may be, in bonds or consols or anything else," to his wife, it was held that the wife was not entitled to a leasehold house, or furniture, or chattels, so that it was not a general residuary gift, but only a gift of moneys invested on any security; and in *Lowe* v. *Thomas* (3), it was held that a gift of "the whole of my money" did not pass either furniture or stock. Again, in *Ogle* v. *Knipe* (4), under a bequest of "all my moneys and securities for money," it was held by Vice-Chancellor *James* that bank stock and canal shares did not pass. The words "moneys however invested" are equivalent to "securities for money," so that the stocks which the testatrix held did not pass either.

Eddis, in reply.

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(1) 2 Keen, 14.
(2) 35 Beav. 396.
(3) Kay, 369; 5 D. M. & G. 315. 18 Jur.
(4) Law Rep. 8 Eq. 434.

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HALL, V.C. :—

This is a will as to which, trying it by reference to authorities and to the rules laid down in the different cases which have been referred to, it is difficult to say that any construction to be put upon it will harmonise entirely with the views which have been expressed in those cases. I confess that I have had a difficulty in coming to a conclusion upon it. There are in this case specific gifts coming after the gift which I have to construe, and that is a circumstance which was referred to in one of the authorities cited as shewing that the preceding gift could not have been meant to be residuary. As regards that there is a difference in the judgments in *Lowe* v. *Thomas* (1), before the Court of Appeal, and in *Stooke* v. *Stooke* (2), before the Master of the Rolls. In *Stooke* v. *Stooke* the Master of the Rolls held the gift to be residuary, notwithstanding that there was a subsequent gift, but he held that the particular subject-matter of that subsequent gift would not pass under that which would otherwise have been a complete residuary gift. It appears to me upon the whole that although that is a most important circumstance to be regarded in ascertaining whether or not the gift is residuary, yet it is not necessarily conclusive in this case. The specific things which are given in this particular case are a brooch to one person, an ornament to another, and so forth, some small things, and the plate—which probably was not of any great value—and the linen. Now, if there be anything in this will which points to this not being a sufficient circumstance to prevent this gift being residuary (if it would be so but for that circumstance) I should be disposed, for the purpose of avoiding an intestacy, to hold that this was intended to be, and should be construed as a residuary gift. And I think that there is a feature in this case which enables me to treat it as distinguishable from the other cases which have been referred to, and it is that to which Mr. *Eddis* called attention in his opening, viz., that this gift of "the rest of my money however invested" is "under deduction of £50 to be paid to each of my executors after named." From that it appears that the testatrix was there, in association with that disposition, making a disposition of a portion

(1) 5 D. M. & G. 315. 18 Jur 563. (2) 35 Beav. 396.

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of what I may call her general estate. The £50 is a legacy which, as I observed or threw out in the course of the discussion, is at least demonstrative. If the gift of "all my moneys" were a specific gift, that of the £50 would be demonstrative, so that it would come out of the "moneys," and also, if necessary, out of the general estate. But the question being whether this is a specific gift or not, if I find given in association with or charged on it a legacy which is either general, or if demonstrative, is at all events a legacy which would if necessary be satisfied out of the general estate, that appears to me to shew that the testatrix was there dealing not merely with specific property, but also with that which affected and operated upon, or might operate upon, the general estate. It seems to me that that is a circumstance shewing that the testatrix was making a general disposition of her residue by the expression "the rest of my money however invested."

Taking into consideration, as I do, the position and means of the testatrix at the time she made her will, I consider and hold that this testatrix has not died intestate as to any part of her property, in other words, that this particular gift of "all her moneys however invested" is a residuary gift of personal estate, and consequently that the next of kin do not take.

Solicitor for all parties: *W. M. Webster.*

W. W. K.

STEEL *v.* DIXON.

[1879 S. 367.]

FRY, J.
1881
March 28, 29.

Principal and Surety—Co-sureties—Contribution—Security given by principal Debtor to one Co-surety.

A surety, who has obtained from the principal debtor a counter-security for the liability which he has undertaken, is bound to bring into hotchpot, for the benefit of his co-sureties, whatever he receives from that source, even though he consented to be a surety only upon the terms of having the security, and the co-sureties were, when they entered into the contract of suretyship, ignorant of his agreement for security.

The American cases *Miller* v. *Sawyer* (1) and *Hall* v. *Robinson* (2) followed.

9 QBD 781
24 ChD/

IN October, 1878, *William Robinson* applied to his bankers for an advance of £800. The bankers consented to make the advance upon the security of a joint and several promissory note for £800 signed by *Robinson* and four sureties. *Robinson* applied to *G. W. Dixon* and *Jason Gurney* to become two of the sureties, and they consented to do so upon the terms of his securing them, by means of an assignment or transfer of sufficient property of his own, from any liability upon the note. The note was dated the 28th of October, 1878, and was signed by *Dixon* on the 27th of October and by *Gurney* on the 28th October, and was payable on the 30th of April, 1879. Afterwards *Robinson* procured *T. A. Steel* and *W. Chater* to act as the other sureties. *Steel* signed the note on the 15th of November, 1878, and *Chater* a day or two before. Neither *Steel* nor *Chater* when they signed the note had any knowledge of the agreement between *Robinson* and *Dixon* and *Gurney* that he should give them security. On the 24th of February, 1879, *Robinson* executed a bill of sale of his furniture to *Dixon* and *Gurney* as security for their liability on the note. The deed contained a power of sale, and it was declared that the grantees should apply the proceeds of sale in the first place in the payment of expenses, and in the second place in or towards payment of the share or shares of the moneys which should or might become payable upon or in respect of the promissory note, and which share or shares *Dixon* and *Gurney* should or might, as between themselves and *Steel* and *Chater*, be liable to pay or contribute in the event of default being made by *Robinson* in the payment of all or any part of the moneys due under the promissory note; and in the third place towards payment of the residue of the moneys which should or might become payable upon or in respect of the promissory note, and which residue *Steel* and *Chater* would upon default of *Robinson* be primarily liable to pay or contribute, but so that *Steel* and *Chater* or either of them should have no right or power to interfere or claim any benefit in the provisions of the security; and lastly, to pay any surplus of the proceeds to *Robinson.* This deed was registered under the *Bills of Sale Act.* On the 18th of March, *Robinson* filed a liquidation petition. The promissory note was paid to the bankers at maturity by the four sureties, each of them contributing £200. *Dixon* and *Gurney* afterwards sold the furniture comprised in the deed of the 24th of February, 1879, realizing thereby about £500. This action was brought by *Steel* and *Chater* against *Dixon* and *Gurney*, claiming a declaration that *Dixon* and *Gurney* were bound to account to the Plaintiffs, as co-sureties of the promissory note, for the sums received by them by the sale of the furniture; that an account might be taken of the moneys so received; and payment to each of the Plaintiffs of one-fourth part of what should appear on the taking of the account to have been received by *Dixon* and *Gurney.*

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(1) 30 Vermont, 412.

(2) 8 Iredell, 56.

The trustee in the liquidation of *Robinson* disputed the validity of the deed of the 24th of February, 1879, alleging that its execution by *Robinson* was an act of bankruptcy, and that it was void *in toto* as against the trustee. The trustee was afterwards made a Defendant to the action, and he delivered a statement of defence. An order was subsequently made by *Fry*, J., on the application of *Dixon* and *Gurney*, giving them leave to serve a notice, under rule 17 of Order XVI., of the Rules of Court, 1875, on the trustee, for the purpose of raising as between them and him the question of the validity of the deed. A notice was accordingly served by *Dixon* and *Gurney* on the trustee, and he delivered a reply, alleging the total invalidity of the deed. The

Plaintiffs by their reply to the trustee's defence said that they did not claim any interest in the proceeds of sale of the furniture so far as those proceeds exceeded the £400 secured by the deed of the 24th of February, 1879, to *Dixon* and *Gurney*.

This was the trial of the action.

It was arranged that the question should first be tried whether, assuming that the bill of sale created a valid security as between *Robinson* and his trustee and *Dixon* and *Gurney* for £400 in favour of *Dixon* and *Gurney*, but that it did not create any security in favour of *Steel* and *Chater*, *Steel* and *Chater* were, as between themselves and *Dixon* and *Gurney*, entitled to share in the benefit of the security.

Cookson, Q.C., and *Warmington*, for the Plaintiffs:—

A surety is entitled to the benefit of every security obtained by his co-surety from the principal debtor. Every security obtained by one surety enures for the common benefit of all the co-sureties. At any rate, any surety who knows that there are other co-sureties is bound by this equity. The right of contribution between co-sureties is founded on equity, not on contract: *Dering* v. *Earl of Winchelsea* (1); *Stirling* v. *Forrester* (2). The right to contribution is not affected by the fact that the surety was ignorant that there were other sureties: *Craythorne* v. *Swinburne* (3). In equity the right to contribution as against a solvent co-surety is the same whether the other co-sureties are solvent or insolvent: *Hitchman* v. *Stewart* (4). The principle of contribution between co-sureties is, that it is equitable that the burden should be borne equally by them all. From this it follows that if one has obtained a security from the principal debtor the co-sureties are entitled to an equal share in the benefit of it: *Story's* Equity (5); *Theobald* on Principal and Surety (6); *Swain* v. *Wall* (7); *Knight* v. *Hughes* (8). The American authorities are distinct on the point: *Miller* v. *Sawyer* (9); *Hindsdill* v. *Murray* (10); *McCune*

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(1) 1 W. & T. L. C. 5th Ed. p. 106; 1 Cox, 318.

(2) 3 Bli. 575, 596.

(3) 14 Ves. 160.

(4) 3 Drew. 271.

(5) 11th Ed. pl. 499.

(6) Pl. 283.

(7) 1 Rep. in Chan. 149.

(8) Mood. & M. 247.

(9) 30 Vermont, 412.

(10) 6 Vermont, 136.

v. *Belt* (1); *Aldrich* v. *Hapgood* (2) ; though no case precisely in point is to be found in the English reports. But the principle is that all the co-sureties are to bear equally the burden which ultimately results from the contract of suretyship. If one of them takes a security from the principal debtor the effect is the same as if the principal debtor had made a payment to that surety of the amount for which the security is given. It is not a question of the intention of the parties. If the right which we assert does not exist, there would be nothing to prevent one of several co-sureties from sweeping off the whole of the property of the principal debtor for his own benefit, and thus disabling him from paying the debt, and leaving the other co-sureties to pay the whole of it.

North, Q.C., and *C. Lyttleton Chubb*, for *Dixon* and *Gurney*:—

There was nothing on the face of the promissory note to shew how many persons were to sign it; *Dixon* and *Gurney* signed it before the Plaintiffs. The Plaintiffs knew nothing about the agreement for security when they signed the note. *Dixon* and *Gurney* expressly stipulated for the security before they signed the note. Why should not one surety be entitled to contract with the principal debtor for a benefit? Does equity require that there should be equality between co-sureties when some of them take care to agree that they shall be specially favoured and the others do not?

[FRY, J.:—That would equally apply to a surety obtaining a payment of money from the principal debtor.]

If, after each of the four sureties had paid his £200, one of them had received something from the principal debtor, could he have been compelled to bring the same into hotchpot? If two of the co-sureties, after paying their proportion, sue the principal debtor and the other two refuse to join, and the two who sue recover something from the principal debtor by means either of execution upon a judgment in the action, or by his paying after action brought, or even if he pays upon a threat of proceedings, could they be compelled to share the amount thus recovered with their co-sureties?

(1) 45 Missouri, 174, 179.

(6) 39 Vermont, 617, 620.

[Fry, J.:—Possibly if the co-sureties would not do their part in suing the principal debtor they might lose their right to contribution.]

If such a right existed the other co-sureties could be let in upon the terms of paying their share of the costs of the action. But there is no obligation on the part of one surety to sue the principal debtor for the benefit of his co-sureties. In the present case no right of contribution exists, for each surety has paid one-fourth of the debt. Each surety has a separate claim against the principal debtor; there is no obligation to share with the others anything which he may recover from the principal debtor. If the right which is asserted had existed, it is almost incredible that there should be no English authority for it. *Swain* v. *Wall* (1) and the passage cited from *Theobald* do not support the proposition. *Done* v. *Walley* (2) is rather against it. *Knight* v. *Hughes* (3) only shews that when a surety is suing his co-surety for contribution, he must bring into account any payment which he has received from the principal debtor. As to the American cases, *Miller* v. *Sawyer* (4) professes to follow a settled rule, but there is nothing to shew where that rule is to be found. *Hall* v. *Robinson* (5), which is there referred to, applies to the case of security being obtained by one surety after the liability of all the sureties has attached. In such a case all the co-sureties would have started on the basis of equality, and, if one of them then obtained a security from the principal debtor, it might be said that it was equivalent to his paying part of the debt. But, when one of the co-sureties in the first instance stipulates for a security, they do not start on the footing of equality. The one who makes the stipulation in fact bargains that he will be personally liable only for his proportion of the debt, less the amount of the security. As the Plaintiffs were not aware at the time when they agreed to become sureties of the agreement for security the *ratio decidendi* of *Hall* v. *Robinson* does not apply.

[*Cookson*, Q.C., referred to *Mackeldeii Systema Juris Romani* (6).]

That passage does not touch the present point; it only shews

(1) 1 Rep. in Chan. 149.
(2) 2 Ex. 198.
(3) Mood. & M. 247.
(4) 30 Vermont, 412.
(5) 8 Iredell, 56.
(6) Pl. 438.

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that a surety is put in the place of the principal creditor for the purpose of enforcing contribution from his co-surety.

Millar, Q.C., and *Maidlow*, for *Robinson's* trustee.

FRY, J., after stating the facts, continued :—

The Plaintiffs, by their reply to the trustee in the liquidation of *Robinson*, make no claim under the deed, except to the extent of the £400 which has been raised under it for the Defendants *Dixon* and *Gurney*, and therefore the question on which I have now to express my opinion is this, assuming that the deed created a valid security in favour of *Dixon* and *Gurney*, must it not have created a like valid security in favour of the Plaintiffs, and are not the Plaintiffs, as between themselves and *Dixon* and *Gurney*, entitled to share in the security?

24 ChD 94

In my opinion the Plaintiffs are entitled to share in the benefit secured by the deed to the Defendants. In coming to that conclusion, I base myself on the general principle applicable to co-sureties, as established by the well-known and often-cited case of *Dering* v. *Earl of Winchelsea* (1), the short effect of which I take to be that, as between co-sureties, there is to be equality of the burden and of the benefit. When I say equality I do not mean necessarily equality in its simplest form, but what has been sometimes called proportionable equality. The result of that case was expressed by Baron *Alderson* in *Pendlebury* v. *Walker* (2) in these terms, that "where the same default of the principal renders all the co-sureties responsible, all are to contribute; and then the law superadds that which is not only the principle but the equitable mode of applying the principle, that they should all contribute equally, if each is a surety to an equal amount; and if not equally, then proportionably to the amount for which each is a surety." I hold, therefore, that the result of *Dering* v. *Earl of Winchelsea* is to require that the ultimate burden, whatever it may be, is, as between the co-sureties, to be borne by them in proportion to the shares of the debt for which they have made themselves responsible.

(1) 1 W. & T. L. C. 5th Ed. p. 106; 1 Cox. 318.
(2) 4 Y. & C. Ex. p. 441.

If that be the case, it follows that each surety must bring into hotchpot every benefit which he has received in respect of the suretyship which he undertook, and if he has received a benefit by way of indemnity from the principal debtor, it appears to me that he is bound, as between himself and his co-sureties, to bring that into hotchpot, in order that it may be ascertained what is the ultimate burden which the co-sureties have to bear, so that that ultimate burden may be distributed between them, equally or proportionably, as the case may require.

In coming to that conclusion, as I do upon principle, I am much strengthened by the American authorities to which my attention has been called by Mr. *Cookson.* Mr. Justice *Story,* in his Equity Jurisprudence, asserts the principle in these terms (1): "Sureties are not only entitled to contribution from each other for moneys paid in discharge of their joint liabilities for the principal, but they are also entitled to the benefit of all securities which have been taken by any one of them to indemnify himself against such liabilities." And in the case of *Miller* v. *Sawyer* (2), which was before the Court of Chancery in the State of *Vermont,* the principle is stated thus by Mr. Justice *Barrett,* the learned Judge who delivered the judgment of the Court. Having referred to *Dering* v. *Earl of Winchelsea,* he said (3): "For present purposes it is needless to cite and discuss the books and cases to any considerable extent, in which this subject is treated, and the leading principles of it applied in settling the rights and duties of parties. It may be comprehensively stated, that persons subject to a common burden stand in their relation to each other upon a common ground of interest and of right, and whatever relief, by way of indemnity, is furnished to either by him for whom the burden is assumed, enures equally to the relief of all the common associates;" and in the course of his judgment he refers, among other cases, to that of *Hall* v. *Robinson* (4), in which Chief Justice *Ruffin* said: "The relief between co-sureties in equity proceeds upon the maxim that equality is equity, and that maxim is but a principle of the simplest natural justice. It is a plain corollary from it that, when two or more embark in

(1) 11th Ed. pl. 499.
(2) 30 Vermont, 412.
(3) 30 Vermont, 417.
(4) 8 Iredell, 56.

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the common risk of being sureties for another, and one of them subsequently obtains from the principal an indemnity or counter-security to any extent, it enures to the benefit of all. The risk and the relief ought to be co-extensive." These American decisions are, as it seems to me, exactly in point.

Mr. *North* has urged that a difference may arise where the security taken by one co-surety is taken by virtue of a bargain entered into between him and the principal debtor at the time of his becoming surety. In my judgment that is immaterial. I think it does not affect the principle of equity to which I have referred whether the security is the result of a contract with the debtor at the time when the co-surety becomes a surety, or is voluntarily given subsequently, or arises in any other manner whatever. I repeat, that whatever goes to diminish the total amount of the burden must, in my judgment, be brought into hotchpot.

In saying that, however, I wish to guard myself against its being supposed that this equity may not in any case be varied or departed from. Those to whose benefit the security enures may, of course, contract themselves out of the benefit, and the question may therefore well have to be considered in each case whether there has been such a contract between the co-sureties. But a contract between one surety and the debtor is not to be confounded with a contract between the co-sureties—a contract by which one co-surety renounces his equity in favour of another. In the next place, cases may arise in which one co-surety, by reason of his default in performing his duty towards the other, may estop himself from asserting the equity which he would otherwise have had against him. Some such cases have been suggested by Mr. *North* in the course of his argument. But neither of those principles appears to me to apply in the present case, because here the contract upon which the security was given was made between the debtor and two of the co-sureties, and was not communicated at the time of their contract of suretyship to the other co-sureties, and there appears to me to be nothing in the conduct of the Plaintiffs (upon the assumption on which I am now proceeding) which can deprive them of the benefit of their right against the co-sureties. Therefore, on this assumption I hold that the Plaintiffs would be entitled to the benefit which they claim. It remains to be considered how far the assumptions are correct.

The question was then argued whether the deed of the 24th of February, 1879, was invalid as against the trustee in the liquidation.

Millar, Q.C., and *Maidlow*, for the trustee.

North, Q.C., and *C. Lyttleton Chubb*, for the Defendants *Dixon* and *Gurney*.

Cookson, Q.C., and *Warmington*, for the Plaintiffs.

FRY, J., held that the deed was valid as against the trustee, and that consequently the Plaintiffs were entitled to receive £200 from the Defendants *Dixon* and *Gurney*.

Solicitors for Plaintiffs: *Armstrong & Lamb.*
Solicitor for Defendants *Dixon* and *Gurney* : *J. B. Churchill.*
Solicitors for Trustee: *Stocken & Jupp.*

W. L. C.

BROOKE *v.* BROOKE.

FRY, J.
1881
May 3.

[1879 B. 443.]

Practice—Evidence—Document—Notary Public—Chancery Procedure Act, 1852 (15 *&* 16 *Vict. c.* 86), *s.* 22.

The execution of a release was attested by a notary in a colony. There was no evidence that the attestation was for the purpose of using the deed in Court:—

Held, nevertheless, that it was a document to be used in Court within 15 & 16 Vict. c. 86, s. 22, and that the Court would take judicial notice of the notary's seal and signature.

THIS was an action by an executor against a co-executor for accounts and discovery.

Cookson, Q.C., *Nalder*, and *Hubert Lewis*, for the Plaintiff tendered in evidence a deed of release executed by some of the beneficiaries to the Plaintiff as executor. The deed had been executed in *Canada*, and was signed by and attested by the seal of a notary public. They cited 15 & 16 Vict. c. 86, s. 22; *Morgan's* Chancery Acts and Orders (1); *Armstrong* v. *Stockham* (2).

Westlake, Q.C., and *Bradford*, objected, on the ground that there was no evidence that the person professing to act as notary was a notary, and that the section referred to which directs the Court to take judicial notice of the signature of colonial notaries public only refers to documents such as powers of attorney executed for the very purpose of being used in the proceedings before the Court, but documents which it was not contemplated to use in Court when they were executed were not intended to be included in the section under the general head of "Other documents to be used in the Court."

FRY, J.:—

A document is tendered to me which bears a notarial seal, being a deed of release. The only objection to that evidence is that the person appearing to act as a notary is not proved to be a notary.

The section under which it is sought to put the document in is the 22nd section of the *Chancery Procedure Act*, 1852. Now, the words of that section are somewhat peculiar. It provides that the Court shall take judicial notice of the seal and signature of a notary public in Her Majesty's colonies attesting certain pleadings, affidavits, . . . and "all other documents to be used in the Court."

In my judgment the only true construction of the section is that it includes all documents to be used in the Court, and this is a document to be used in the Court. I shall, therefore, admit the document.

Solicitors: *W. H. Nicholls; C. E. Goldring.*

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(1) Pages 174, 176.

(2) 11 Jur. 97; 24 L. J. (Ch.) 176.

C. W. C.

PARTRIDGE *v.* BAYLIS.

FRY, J.
1881
May 13.

[1875 P. 105.]

Will—Construction—Vesting—"Payable."

A testator, by his will, bequeathed an annuity to his daughter, and directed that after her death the trustees should hold £2000, part of the fund set apart to secure the annuity, upon trust to pay and divide the same unto and equally between the child and children of the daughter as and when they should respectively attain twenty-one, and, in case any of the children should die before their shares should become "payable as aforesaid" without leaving issue, the share or shares of him, her, or them so dying should be paid to the survivor or survivors of them, equally if more than one, and, if but one, the whole to that one, with power for the trustees, during the respective minorities of the children, to apply the income of his, her, or their expectant share or shares towards his, her, or their maintenance and education. And if all such children should die under twenty-one, without leaving issue, the fund was given over:—

Held, that the children's shares absolutely vested at twenty-one, and were not divested by subsequent death without issue in the lifetime of their mother.

JOHN WHADCOAT, by his will, dated the 13th of July, 1844, bequeathed all his personal estate to two trustees, upon trust to convert into money such part or parts thereof as would be sufficient to yield the yearly sum of £100, and to place out the principal moneys so converted at interest, and thereout to pay to his daughter, *Charlotte Harris*, during her life, the yearly sum of £100 for her sole and separate use. "And from and after the decease of my said daughter *Charlotte Harris*, upon trust that my said trustees shall call in the sum of £2000, part of the said trust moneys, and stand possessed thereof, upon trust to pay and divide the same unto and equally between all and every the child and children of my said daughter as and when they shall severally and respectively attain their respective age or ages of twenty-one years. And, in case any or either of my said grandchildren, the children of my said daughter, shall happen to die before his, her or their share or shares thereof shall become payable as aforesaid, without leaving a lawful child or children, then I will and direct that the part or share, parts or shares of him, her, or them so dying (the same to extend as well to original as accruing share or shares) shall go and be paid to the survivor or survivors of them, equally if more than one, and if but one, then the whole thereof to such only child, to whom I hereby give and bequeath the same accordingly, with full power and authority for my said trustees during the respective minorities of my said last-named grandchild or grandchildren to pay and apply the interest, dividends, and proceeds of his, her, or their expectant share or shares for and towards his, her, or their maintenance, education, and support. And, in case all such children shall die under the age of twenty-one years without leaving a lawful child or children," then upon trust as *Charlotte Harris* should appoint, and, in default of appointment, in trust for her next of kin according to the *Statute of Distributions.* And the testator charged certain real estate with the payment of the annuity of £100 and the principal sum of £2000, and subject thereto he devised that real estate, and he devised all other his real estate, to his son *Charles Whadcoat.* The testator died in June, 1845.

This suit was commenced in June, 1875, after the death of *Charles Whadcoat*, to obtain a decree for the sale of the real estate subject to the trusts of the will of *Charles Whadcoat*, which included the real estate subject to the charge created by the will of *John Whadcoat* in favour of his daughter *Charlotte Harris* and her children, and the distribution of the proceeds of sale among the persons interested therein. The Plaintiffs also asked that out of the proceeds of sale such a sum might be set apart as might be necessary to answer the above charge, and that the trusts of the will of *John Whadcoat*, so far as they affected the sum so set apart and remained unperformed, might be carried into execution. In this suit a sum of £3333 6*s.* 8*d.* consols was carried over to an account intituled "the account of the annuity of the Defendant *Charlotte Harris*," and the dividends thereon were paid to her during her life. She died on the 5th of April, 1881. She had had six children, two of whom died in infancy. The other four were *William Harris; Caroline Barrett*, the wife of *Alfred Barrett; Jane Agnes Woodhouse*, the wife of *Matthew Woodhouse;* and *John Harris;* and they all attained the age of twenty-one.

William Harris, Jane Agnes Woodhouse, and *John Harris* died before their mother. *Jane Agnes Woodhouse* alone left issue. A petition was presented by the representative of *John Harris* for the division of the fund.

T. A. Roberts, for the Petitioner:—

The fund is divisible in fourths. The words "payable as aforesaid" must be construed as meaning the attainment of twenty-one: *Hallifax* v. *Wilson* (1); *Mocatta* v. *Lindo* (2).

W. Renshaw, for Mrs. *Barrett* and Mr. *Woodhouse*:—

The fund is divisible in moieties.

"The word "payable" must be read in its natural sense, and the shares could not become payable until after the death of the mother: *Jarman* on Wills (3); *In re Wilmott's Trusts* (4); *Day* v. *Radcliffe* (5); *Chell* v. *Chell* (6). The rule in *Hallifax* v. *Wilson* does not apply, for the testator has provided for the issue of deceased children, and the object of reading the word "payable" as equivalent to "vested" has been to provide for issue who would otherwise have been excluded.

W. Phipson Beale, for another party.

FRY, J.:—

I think that the true construction of the will is that the children of the testator's daughter *Charlotte Harris* who attained twenty-one took vested interests in the £2000, and that the gift over to the survivors took effect only in the event of the death of any of them under twenty-one during the lifetime of their mother and without issue. I am entirely inclined to give the natural meaning to the words of a will whenever I can, and I should have been disposed to give to the word "payable" in the present case its natural meaning—*i.e.,* as referring to the time of actual payment—but for the existence of a class of authorities which shew that it may be construed differently, and for the particular words of this will. I attribute great weight to Mr.

(1) 16 Ves. 168.
(2) 9 Sim. 56.
(3) 4th Ed. vol. ii. p. 807.
(4) Law Rep. 7 Eq. 532.
(5) 3 Ch. D. 654.
(6) 23 W. R. 252.

FRY, J.
1881
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BAYLIS.

Renshaw's argument, but at the same time I think there are indications of intention in the will which lead to an inference that the rule in *Hallifax* v. *Wilson* (1) ought to be applied. In the first place, the words of the gift over are "payable as aforesaid," and the words of the previous trust for payment are "as and when they shall severally and respectively attain their respective age or ages of twenty-one years." I think the words "as aforesaid" must be taken to refer to that direction to pay, so that the gift over in the event of the death of a child before its share becomes payable is equivalent to a gift over in the event of its death under twenty-one. Again, the power of maintenance given to the trustees is limited to the minorities of the children, and this, though a small point, looks in the same direction. Again, the ultimate gift over is in the event of the death of all the children under twenty-one without leaving a child, and the inference is that the gift over in the event of the death of all the children and the gift over in the event of the death of some of them were intended to apply in a similar state of circumstances, which they would not do, unless I read the words "payable as aforesaid" as meaning the attainment of twenty-one, so that both the gifts over may apply to death without issue under twenty-one. This appears to me the more natural construction of the clauses as a whole, and I shall accordingly declare that the fund is divisible into fourths among the four children who attained twenty-one, or their representatives.

Solicitors for Petitioner: *Pattison, Wigg, & Co.*, agents for *S. Bright Williams, Redditch.*

Solicitors for Respondents: *Tucker & Lake; Beale, Marigold, & Co.*

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(1) 16 Ves. 168.

W. L. C.

Ex parte SULGER. *In re* CHINN.

C. J. B.
1881
May 16.

Bankruptcy—Elegit against Goods and Chattels executed by Seizure but not by Sale after but without Notice of Act of Bankruptcy—Relation back—Transaction not protected—Bankruptcy Act, 1869 (32 *&* 33 *Vict. c.* 71), *ss.* 11, 95 (*sub-s.* 3).

After an act of bankruptcy had been committed, a judgment creditor for a sum exceeding £50, without notice of the act of bankruptcy, issued an *elegit* against the goods of the bankrupt (there being no land); but before inquisition proceedings preparatory to sale had been commenced, a bankruptcy petition founded on the act of bankruptcy was presented, and the sheriff was restrained:—

Held, that the transaction was not protected by sub-sect. 3 of sect. 95.

APPEAL from an order of the County Court at *Coventry.*

On the 9th of March, 1881, the bankrupt, *Charles Chinn*, who was a trader at *Coventry*, committed an act of bankruptcy by departing from his dwelling-house with intent to defeat and delay his creditors.

On the 10th of March the Appellants, *Hans Sulger*, and two others, who had recovered judgment against *Chinn* in an action, issued a writ of *elegit* for £65 10*s.* 2*d.* debt and £3 14*s.* costs against the goods of *Chinn*, there being no land in his possession; and on the following day, the 11th, the sheriff took possession.

On the 15th of March a bankruptcy petition was presented against *Chinn*, founded on the alleged above-stated act of bankruptcy; and on the same day the Registrar, on the application of the petitioning creditor (who at that time thought the sheriff was in under a *fi. fa.*), made an order restraining the sheriff from selling under the execution until the 22nd of March. On the 17th, the petitioning creditor having found out that the possession was under an *elegit*, made another application to the Court, and a further order was made, restraining the sheriff from proceeding to inquisition and appraisement.

On the 21st of March the adjudication in bankruptcy was made; and on the 6th of April *Henry Merrick* was appointed trustee of the estate.

On the 13th of April the orders now appealed from were made, whereby the Appellants were perpetually restrained from taking further proceedings in the action or under the *elegit*.

The learned Judge of the County Court referred to the case of *Ex parte Pillers* (C. J. B. Feb. 28, 1881) (which had not then been heard in the Court of Appeal), and to the case of *Ex parte Abbott* (1), and came to the conclusion that the transaction was not protected by sect. 95, and that the trustee was entitled to the goods, inasmuch as his title related back to the act of bankruptcy.

Warmington, for the Appellants, the judgment creditors:—

The question is whether the creditor in this case is protected. In the case of *Ex parte Abbott*, cited in the Court below, no doubt an inquisition had been held. Here, before an inquisition could be held, we were intercepted, the sheriff was restrained, and there never has been an inquisition (2).

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(1) 15 Ch. D. 447.

(2) The following is an abbreviation of the form of the writ of *elegit*:—

"*Victoria*, &c.

"To the sheriff, &c.

"Whereas, lately in our High Court of Justice, in a certain cause [describing it] by a decree [or order, with date] it was decreed and ordered [or ordered] that the said *C. D.* should pay to the said *A. B.* the sum of £ , together with interest [giving the rate and date]; and afterwards the said *A. B.* came into our said High Court of Justice, and according to the form of the statute in such case made and provided, chose to be delivered to him [or her or them] all the goods and chattels of the said *C. D.* in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said *C. D.*, or any one in trust for him, was seised and possessed of on the day of in the year of our Lord 18— [the date of the decree or order], or at any time afterwards, or over which the said *C. D.* on the said day of or at any time afterwards had any disposing power, which he might, without the consent of any other person, exercise for his own benefit; to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands [&c., as above] respectively, according to the nature and tenure thereof, to him and to his assigns until the said sum of £ , together with the interest thereon [stating rate and date], shall have been levied: Therefore we command you that without delay you cause to be delivered to the said *A. B.*, by a reasonable price and extent, all the goods and chattels of the said *C. D.* in your bailiwick except his oxen and beasts of the plough, and also all such lands [&c., as above] in your bailiwick as the said *C. D.* or any person in trust for him was seised or possessed of on the said day of or at any time afterwards, or over which the said *C. D.* on the said day of or at any time afterwards had any disposing

The writ of *elegit* enables the sheriff to deliver to the creditor the land of the debtor, but it also enables him to deliver to the creditors the debtor's goods. Then the question under the 95th section arises—has execution under the writ the same effect for all purposes, or is its effect as a protected transaction confined to its operation on land. No one doubts that if there had been land, the execution would have been protected under sub-sect. 2 of sect. 95.

If execution against land under the writ would be protected, why should not execution against goods? If the writ is good for one purpose, why is it not good for all?

Reference no doubt will be made to the decision of the Court of Appeal in *Ex parte Pillers* (1). But the Court in that case expressly declined to say what would have been their decision, if the money had actually got into the hands of the creditor under the garnishee order—if the security had been actually realized. The question then is whether seizure of goods under an *elegit*, though the goods are not sold, is not an actual realization, within the protection of the section.

R. Vaughan Williams, for the trustee:—

Here there is no land; the only question is as to goods; and it is undisputed that the trustee's title must relate back to the act of bankruptcy.

Under these circumstances there never was any seizure of goods which were the goods of the execution debtor. From the date of the act of bankruptcy they were the goods of the trustee. Suppose the inquisition had been carried out, the jury in answer to the

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power, which he might without the assent of any other person exercise for his own benefit; to hold the said goods and chattels to the said *A. B.* as his proper goods and chattels, and also to hold the said lands [&c.] respectively according to the nature and tenure thereof to him and to his assigns until the said sum of £ together with interest as aforesaid shall have been levied; And in what manner you shall have executed this our writ make appear to us in our High Court of Justice aforesaid immediately after the execution thereof under your seal and the seals of those by whose oath you shall make the said extent and appraisement; And have there then this writ. Witness," &c.

(1) *Ante*, p. 653.

charge "to inquire of the several matters in the said writ mentioned," must have found that the execution debtor had not, on the day mentioned in the writ, and on the day of taking the inquisition, any goods or chattels in the bailiwick, because the goods and chattels which belonged to the execution debtor at the date of the decree or order had ceased to be his at the date of the inquisition, he having committed an act of bankruptcy in the meantime.

In *Ex parte Abbott* (1) the seizure was before any act of bankruptcy; here the seizure was subsequent to the act of bankruptcy.

Then, does the protective section apply? The object of this section, no doubt, was to mitigate the effect of the doctrine of relation back. But under sub-sect. 3 you must have inquisition and appraisement followed by sale in order to satisfy the words "execution by seizure and sale." Here there has not been inquisition and appraisement; still less has there been any sale.

Warmington, in reply:—

No doubt if the doctrine of relation back applies to the case, the Appellant cannot succeed.

But is not an execution under an *elegit*, possession having been taken, a protected transaction? The form of the writ is that the sheriff shall "cause to be delivered to *A. B.* by a reasonable price and extent" the goods and chattels. Under a *fi. fa.* the creditor gets only the proceeds of sale; under an *elegit* he gets the actual goods by way of pledge, and then the inquisition and appraisement follow, namely, to ascertain the "reasonable price and extent" of such delivery. This form is based upon the *Statute of Westminster the Second* (2), which enacts that the sheriff shall "deliver" to the creditor "all the chattels of the debtor (saving only his oxen and beasts of the plough) and the one half of his land, until the debt be levied upon a reasonable price or extent." The sheriff's possession is consequently the possession of the creditor, and execution is complete when possession is taken.

The case is not provided for except by sub-sect. 2, and by that sub-section the transaction is protected.

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(1) 15 Ch. D. 447.

(2) 13 Edw. 1, c. 18.

BACON, C.J.:—

The case has no doubt some features of novelty, and the point is well worthy of investigation.

As Mr. *Warmington* says, the real question is, whether the sheriff was sufficiently armed by the authority which the *elegit* gave him to take these goods and hold them for the benefit of the creditor, as against the provisions of the statute which declare that the bankruptcy shall be deemed to have relation back to and commence at the time of the act of bankruptcy; and that the property of the bankrupt divisible amongst his creditors shall comprise all such property as may belong to or be vested in him at the commencement of the bankruptcy.

With regard to the doctrine of relation back, I feel myself bound to hold that on the 9th of March, which was the date of the act of bankruptcy, the goods which the sheriff seized had ceased to be the property of the bankrupt and had become the property of the trustee.

That is the important question, and disposes of the case; for if these chattels were not the goods of the bankrupt, then the protecting section does not apply. The 95th section provides that the following transaction, amongst others, shall be valid, notwithstanding any prior act of bankruptcy—"Any execution or attachment against the goods of any bankrupt executed in good faith by seizure and sale before the date of the order of adjudication," if without notice. In other words, if after seizure and sale bankruptcy intervenes, the proceeds of sale are nevertheless to be held on behalf of the execution creditor.

Now, the decision of the Court of Appeal in *Ex parte Pillers* (1) does not favour the present Appellant's contention. If not an authority precisely in point, it comes so near to the case as at least to furnish an excellent illustration. There a debt due from *A.* to the bankrupt was attached by the respondent creditor after the act of bankruptcy had been committed, but without notice. A difference has been pointed out in the judgments of the Lords Justices on one point, namely, whether a debt due to a bankrupt comes within the expression, "the goods of" a bankrupt. Lord Justice *James* seems to have thought that the words

(1) *Ante*, p. 653.

C. J. B.
1881
Ex parte SULGER.
In re CHINN.

"attachment against the goods of a bankrupt" had no application to garnishing a debt, whilst Lord Justice *Lush* was of opinion that debts might be included within the term "goods." But at all events their Lordships agreed in this, that the debt remained the property of the bankrupt, though it had been attached by and was in the hands of the garnishee; and Lord Justice *Lush* went on to say that until the security was realized, until there was an actual receipt of the debt attached under the garnishee order, there was no "attachment executed by seizure and sale" within the 95th section. It was held that the attachment was not protected. That is the clear decision of the Court, notwithstanding the difference of view expressed on the point I have mentioned.

The decision in *Ex parte Abbott* (1), though a useful and valuable decision, does not seem to have any practical bearing on the present question.

The result is, that on the 9th of March the trustee was the true and only owner of these goods which the sheriff actually seized; so that neither upon any principle of bankruptcy law, nor under the statute, did the sheriff on the 9th of March seize any "goods" of the bankrupt.

The appeal must be dismissed with costs.

Solicitors: *R. H. Harris; Sharpe, Parkers, & Co.*, agents for *Hughes & Masser, Coventry.*

(1) 15 Ch. D. 447.

J. B. D.

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BANKRUPTCY—*Act of Bankruptcy—Bill of Sale—Assignment of whole Property as Security for past Debt and further Advances—Substantial Exception—Tenant Right—Contemplation of further Advances—Notice of Act of Bankruptcy.*] In order that the execution of a bill of sale of substantially the whole of the grantor's property as security for a pre-existing debt and further advances may not be an act of bankruptcy, it is necessary that there should be an agreement binding the grantee to make further advances.—It is not sufficient that further advances should have been in the contemplation of the parties, the deed being stamped so as to cover them, and further advances having been actually made after the execution of the deed.—A farmer assigned by a bill of sale, as a security for a pre-existing debt and further advances, the whole of his property, except a part of his tenant right under his agreement of tenancy. That agreement provided that the tenant should be paid on quitting the farm for all fallows made in the last year of the tenancy (not exceeding a certain proportion), for all seeds duly sown by him, for all dung made during the last year, for all hay, fodder, and straw the produce of the last year, &c., at a valuation. But it was also provided that, in case of any breach or non-performance of any of the stipulations on the part of the tenant, it should be lawful for the landlord to re-enter, and that, in case no entry should be made, the landlord should on the expiration of the tenancy be entitled to an allowance from the tenant in respect of any such breach or non-performance, to be deducted from the tenant's valuation. There was no covenant or agreement binding the grantee to make further advances, though the deed was stamped so as to cover a further advance:—*Held*, that the tenant right did not form a substantial exception from the deed; that the execution of the deed was an act of bankruptcy by the grantor; and that it was void as against the trustee in his bankruptcy, which commenced within three months afterwards.—Some small further advances were, in fact, made by the grantee to the grantor, soon after the execution of the deed, to enable him to pay the wages of his labourers:—*Held*, that inasmuch as the grantee had made those advances with notice of the act of bankruptcy committed by the execution of the deed, he could not retain them out of the proceeds of sale of the grantor's stock which he had seized under the deed.—*Ex parte Winder* (1 Ch. D. 290, 560) considered. *Ex parte* DANN. *In re* PARKER - **C. A. 26**

2. —— *Act of Bankruptcy—Fraudulent Transfer of Goods—Fraudulent Preference—Sale of Goods to Co-Trustee—Application of Purchase-money to make good Breach of Trust—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 6 (*sub-s.* 2), 92.] An actual sale of goods for money, the vendor intending to use the purchase-money in making a voluntary payment and the purchaser knowing of that intention, is not a fraudulent transfer within sect. 6 (sub-sect. 2) of the *Bankruptcy Act*, 1869.—A voluntary preference of a creditor, though it can be set aside as a fraud on the bankrupt law, is not an act of bankruptcy.—If a debtor on the eve of bankruptcy voluntarily makes good trust money which he has misapplied, the payment cannot be set aside as a fraudulent preference of the trust estate.—Within three months before the filing of a liquidation petition the debtor, who was one of the executors of a will, sold some goods to his co-executor with the intention of applying the purchase-money in repaying to the testator's estate money which he had improperly abstracted from it. This intention was known to the co-executor, and the purchase-money was, with his knowledge, immediately after its payment by him, paid by the vendor into a bank to the credit of the executors:—*Held*, by the Court of Appeal, that the transaction was not either a fraudulent preference within sect. 92 of the *Bankruptcy Act*, 1869, or a fraudulent transfer of property within sect. 6 (sub-sect. 2), and that neither the co-executor nor the testator's estate could be compelled to refund the money.—Decision of *Bacon*, C.J., affirmed. *Ex parte* STUBBINS. *In re* WILKINSON **C. A. 58**

3. —— *Attaching "Salary or Income" of Bankrupt—Voluntary Allowance—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 90.] A purely voluntary allowance made to a bankrupt is not "income" within the meaning of sect. 90 of the *Bankruptcy Act*, 1869, and no order can be made for the payment of any part of such an allow-

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ance, when received by the bankrupt, to the trustee in the bankruptcy.—In order that sect. 90 may apply, the payment must be one to which the bankrupt has a legal or equitable claim.—Decision of *Bacon*, C.J., reversed. *Ex parte* Wicks. *In re* Wicks - - - 70

4. —— *Attachment—Secured Creditor—Tolzey Court of Bristol—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 16, *sub-s.* 5.] An attachment of the goods of the Defendant in an action of debt in the Tolzey Court of *Bristol* is only a process to compel the appearance of the Defendant, and does not make the Plaintiff a secured creditor within the meaning of sect. 16, sub-sect. 5, of the *Bankruptcy Act*, 1869.—The effect of an attachment in the Tolzey Court is the same as that of a foreign attachment under the custom of the Mayor's Court of *London.*—*Levy* v. *Lovell* (14 Ch. D. 234) followed. *Ex parte* Sear. *In re* Price - - - - - **C. A.** 74

5. —— *Composition under Sect.* 28 *of Bankruptcy Act*, 1869—*Locus Standi of Bankrupt to apply to reduce Proof of a Creditor—File of Proceedings in Bankruptcy—Estoppel.*] After the creditors of a bankrupt have resolved, under sect. 28 of the *Bankruptcy Act*, 1869, to accept a composition offered by the bankrupt, the bankrupt, though undischarged, has a *locus standi* to apply to the Court to reduce the amount of the proof of a creditor, and the mere fact that the proof has been upon the file of the proceedings in the bankruptcy for upwards of a year does not estop the bankrupt from making the application.—Decision of *Bacon*, C.J., affirmed.—The file of the proceedings in a bankruptcy is not in the nature of a record, and does not create an estoppel. *Ex parte* Bacon. *In re* Bond - **C. A.** 447

6. —— *Debtor's Summons—Liquidated Demand—Equitable Mortgage by Deposit—Interest—Bankruptcy Act*, 1869, *s.* 6.] In April, 1879, *A.* deposited title deeds with *B.* to secure repayment of an advance of £1000, and an agreement was at the same time executed that the deeds should be held as an equitable security for payment, on the 15th of July, 1879, of the £1000 and interest at 7½ per cent. per annum, and also that *A.* should execute to *B.* a legal mortgage of the property, with power of sale and such other powers as *B.* might require for further securing payment of the money which should then be owing on the security of the agreement, "with interest for the same after the rate aforesaid."—In January, 1881, *B.* took out a debtor's summons for £150, on the footing that interest continued to be paid at the rate of 7½ per cent. down to the date of demand, and not merely until the 15th of July, 1879 (in which case the debt would have been under £50):—*Held*, that the agreement amounted to a contract that if the £1000 was not repaid in July, 1879, interest at 7½ per cent. should continue to be paid, and accordingly that there was a liquidated demand of sufficient amount within the *Bankruptcy Act*, 1869, s. 6, to support the debtor's summons. *Ex parte* Furber. *In re* King 191

7. —— *Disclaimer by Trustee—Onerous Property of Bankrupt—Lease—Effect on Rights and Liabilities of Third Parties—Construction of Statutes—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 23—*Bankruptcy Rules*, 1871, *r.* 28.] A disclaimer by the trustee in a bankruptcy of a lease or other onerous property of the bankrupt operates as a surrender only so far as is necessary to relieve the bankrupt and his estate and the trustee from liability, and does not otherwise affect the rights or liabilities of third parties in relation to the property disclaimed.—If, for instance, the bankrupt has granted an underlease of property demised to him, a disclaimer of the original lease by his trustee in bankruptcy does not affect the right of the lessor to distrain on the property for the rent reserved by the original lease, and to re-enter for breach of the lessee's covenants in the lease, or for non-payment of the rent reserved thereby.—But, if the underlease is made at a rent less than the rent reserved by the original lease, the underlessee is, after the disclaimer, entitled to prove in the bankruptcy for the value of the difference between the two rents.—A statute may be construed contrary to its literal meaning, when a literal construction would result in an absurdity or inconsistency, and the words are susceptible of another construction which will carry out the manifest intention. *Ex parte* Walton. *In re* Levy [**C. A.** 746

8. —— *Disclaimer of Lease—Trustee in Bankruptcy—Leave of Court—Power to impose Conditions—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 23—*Bankruptcy Rules*, 1871, *r.* 28.] In giving leave to the trustee in a bankruptcy to disclaim a leasehold interest of the bankrupt, the Court has, under rule 28 of 1871, power to impose a condition (such as the payment to the lessor of the rent in full up to the date of the disclaimer) even though no third party has acquired from the bankrupt an interest in the lease. *Ex parte* Ladbury. *In re* Turner - - **C. A.** 532

9. —— *Disclaimer by Trustee—Leasehold Property of Bankrupt—Leave of Court—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 23—*Bankruptcy Rules*, 1871, *r.* 28.] In determining whether leave should be given to a trustee in bankruptcy to disclaim a leasehold interest of the bankrupt, the Court ought to have regard only to the question whether the disclaimer will be for the benefit of the persons interested in the administration of the bankrupt's estate, and ought not to have regard to any collateral consideration, such as the injury which the disclaimer might occasion to third parties.—Leave to appeal to he House of Lords refused, on the ground that the appeal would be from the discretion of the Court. *Ex parte* East and West India Dock Company. *In re* Clarke - - - - **C. A.** 759

10. —— *Elegit against Goods and Chattels executed by Seizure but not by Sale after but without Notice of Act of Bankruptcy—Relation back—Transaction not protected—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 11, 95 (*sub-s.* 3).] After an act of bankruptcy had been committed, a judgment creditor for a sum exceeding £50, without notice of the act of bankruptcy, issued an *elegit* against the goods of the bankrupt (there being no land); but before inquisition proceedings preparatory to sale had been commenced, a bank-

BANKRUPTCY—*continued.*
ruptcy petition founded on the act of bankruptcy was presented, and the sheriff was restrained:—*Held*, that the transaction was not protected by sub-sect. 3 of sect. 95. *Ex parte* SULGER. *In re* CHINN - - - - - - 839

11. —— *Examination of Witness as to Property of Bankrupt—Production of Documents—Discretion of Court—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 96.] In determining whether an order for the production of documents should be made under sect. 96 of the *Bankruptcy Act*, 1869, the Court has to exercise a discretion.—From the examination of a person summoned for examination under sect. 96, at the instance of the trustee of a bankrupt, it appeared that a policy of insurance on the life of the bankrupt's wife, which had been effected by her before her marriage with the bankrupt, and which had been after the marriage assigned by the husband and wife to trustees, on trust for the wife for her separate use, had after the bankruptcy been assigned by way of mortgage, by a deed to which the bankrupt and his wife were parties; that the mortgage had been afterwards transferred to the witness; and that the wife had subsequently executed a deed assigning the equity of redemption to him:—*Held*, that the witness must produce the mortgage deed, the deed of transfer, and the deed of assignment. *Ex parte* TATTON. *In re* THORP - - - - - C. A. 512

12. —— *Jurisdiction—Discretion—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 72.] Although, as a general rule, cases in which the trustee in bankruptcy is asserting a claim to property by a higher title than that of the bankrupt himself ought to be tried in the Court of Bankruptcy, yet the rule is not an inflexible one, but the Court has a judicial discretion to be exercised with regard to all the circumstances of the case:—*Held*, that the fact that a large amount was at stake, and that questions of character were involved, were sufficient grounds for refusing to allow a case, in which the trustee in a liquidation was seeking to set aside some transactions of the debtors as fraudulent under the bankruptcy law, to be tried in a County Court. *Ex parte* ARMITAGE. *In re* LEAROYD, WILTON, & CO. C. A. 13

13. —— *Letters addressed to Bankrupt—Order for Redirection—Appeal—Person aggrieved—Locus Standi—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 85.] Under sect. 85 of the *Bankruptcy Act*, 1869, an application for an order for the redirection of letters addressed to a bankrupt can only be made by the trustee in the bankruptcy.—The petitioning creditor has no *locus standi* either to make application, or to appeal from an order made on the application of the trustee if he thinks that order not sufficiently extensive.—If the trustee refuses to apply for such an order, or to appeal from an order made on his application, the petitioning creditor cannot apply to the Court himself.—*Semble*, that he might obtain authority to use the name of the trustee. *Ex parte* LISTER. *In re* HALBERSTAMM [C. A. 518

14. —— *Proof—Promoter of Company—Secret Profit—Discharge—"Unliquidated Damages"—"Contract"—"Debt incurred by means of Fraud or Breach of Trust"—Bankruptcy Act*, 1869, *ss.* 31, 49.] Under a secret agreement between the vendors of a mine and *G.*, a financial agent who was promoting and afterwards formed a company for its purchase, *G.* received from the vendors part of the purchase-money without the knowledge of the company. In an action by the company to make *G.* liable for the amount of the secret profit he had so made, a specific sum was found due from him to the company upon that footing. *G.* then presented a petition for liquidation, and his creditors passed a resolution for liquidation of his affairs by arrangement; a trustee was appointed of his estate, and he obtained his certificate of discharge:—*Held*, that the company were to be at liberty to go in and prove against *G.'s* estate as creditors for the sum found due from him in the action, it not being a "demand in the nature of unliquidated damages arising otherwise than by reason of a contract."—*Held*, also, that the debt so due from *G.* was incurred by "fraud" and also "breach of trust" within sect. 49 of the *Bankruptcy Act*, 1869, and that, accordingly, *G.* was not released from such debt by his discharge; and he was thereupon ordered personally to pay the debt to the company, or so much thereof as should not be received by the company under the liquidation. EMMA SILVER MINING COMPANY *v.* GRANT - 122

15. —— *Proof—Guarantee to Bankers—Payment by Surety after Proof by Creditor—Reduction of Proof—Agreement between Surety and Creditor that Receipt by Creditor of Dividends in Bankruptcy of principal Debtor shall not diminish Liability of Surety to pay in full.*] A customer gave to his bankers, as a security for the balance which might from time to time be due from him to them, the joint and several bond for £1000 of himself and a surety, the liability of the surety being expressly limited to £500. There was a proviso in the bond that any dividends received by the bankers in the bankruptcy of the customer should not, so far as concerned the surety, go in discharge of his liability; but the bankers should notwithstanding be entitled to recover on the bond against the surety to the full extent of £500, or so much thereof as should, together with the dividends, amount to 20*s.* in the pound on the debt due by the customer to the bankers. The customer filed a liquidation petition, and the bankers proved for the debt due to them. Afterwards the surety paid the bankers £500, and he then proved in the liquidation for 500:—*Held*, by *Bacon*, C.J., that the proof of the bankers must be reduced by £500, but that this reduction would not prejudice any right of the bankers against the surety.—*Held*, by the Court of Appeal, that the bankers were entitled to retain their proof for the full amount. *Ex parte* NATIONAL PROVINCIAL BANK OF ENGLAND. *In re* REES - C. A. 98

16. —— *Proof—Interest after Adjudication—Joint and Separate Estates.*] A creditor whose proof is admitted against both the separate estates of two bankrupts who have been partners is not entitled to receive any dividend in respect of interest accrued on his debt subsequently to the date of the adjudication, until the joint creditors

BANKRUPTCY—*continued.*

have been paid the principal of their debts in full.—*Warrant Finance Company's Case* (Law Rep. 5 Ch. 86), and *Warrant Finance Company's Case* (No. 2) (Law Rep. 5 Ch. 88) distinguished. *Ex parte* Findlay. *In re* Collie - **C. A.** 334

17. —— *Proof—Judgment Debt—Power of Court to go behind Judgment.*] The Court of Bankruptcy will go behind a judgment or a compromise, and refuse to admit a proof founded upon it, if it can see that the original claim was not a *boná fide* one, but was made for purposes of extortion, the claimant knowing that he had no legal claim, but being aware of circumstances affecting the character of the Defendant which would prevent the latter from submitting to a cross-examination.—*Per Brett*, L.J., *Callisher* v. *Bischoffsheim* (Law Rep. 5 Q. B. 449) questioned. *Ex parte* Banner. *In re* Blythe - - **C. A.** 480

18. —— *Protected Transaction—Dealing with Bankrupt—Attachment against Goods of Bankrupt—Garnishee Order—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 94 (*sub-s.* 3), 95 (*sub-s.* 3).] A garnishee order, attaching a debt due to a bankrupt, is not a "dealing" with the bankrupt within sect. 94, sub-sect. 3, of the *Bankruptcy Act*, 1869.—Whether such an order is "an attachment against goods" of a bankrupt within sect. 95, sub-sect. 3, *quære.*—But, if it is, it is not within the protection of sect. 95, sub-sect. 3, unless the garnishor has obtained actual payment of the attached debt from the garnishee before the order of adjudication.—Decision of *Bacon*, C.J., reversed.—Leave to appeal to the House of Lords refused. *Ex parte* Pillers. *In re* Curtoys [**C. A.** 653

19. —— *Trader—Carrying on Business by Trustee—Power of Creditors—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 14, 20, 25.] The creditors of a bankrupt trader have no power to authorize the trustee to carry on the business of the bankrupt, except so far as may be necessary for the beneficial winding-up of the business.—If the majority of the creditors pass a resolution authorizing the trustee to carry on the business for any other purpose, such as the hope of making a profit thereby, the resolution is not binding upon the non-assenting minority, and the Court ought to interfere and to declare it invalid. *Ex parte* Emmanuel. *In re* Batey - **C. A.** 35

20. —— *Undischarged Bankrupt—Earnings of Personal Labour—Architect—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 17—*Practice—Adding Plaintiff—Rules of Court*, 1875, *Order* xvi., *r.* 13.] The Plaintiff, who was an architect, sued for remuneration in respect of employment under a contract made in 1877, and for damages for an alleged wrongful dismissal from such employment in 1880. The Plaintiff was adjudicated bankrupt in 1878, and had never obtained his discharge:—*Held* (affirming the decision of *Fry*, J.), that the cause of action for remuneration and damages passed to the trustee, and that the proper course was to add him as co-Plaintiff in the action, and give him the conduct of the action. Emden *v.* Carte - - 169, **C. A.** 768

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—— *Stelfox* v. *Sugden* (1 Joh. 234) considered
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CHARITY—*Royal Society—Voluntary Association—Sale of Land—Charitable Trusts Acts,* 1853, *s.* 62, *and* 1855, *ss.* 29, 48.] The *Royal Society*, a voluntary association of learned men founded in the reign of King *Charles* II., in 1732, purchased, out of moneys arising from the subscriptions of the members, real estate at *Acton*, and in 1881 sold part of it. An objection was taken by the purchaser that the consent of the Commissioners under the *Charitable Trusts Acts*, 1853 (16 & 17 Vict. c. 137, s. 62) and 1855 (18 & 19 Vict. c. 124, s. 29), was necessary, on the ground that the society was un endowed charitable institution:—*Held*, that, the estate having been purchased out of the moneys arising from the voluntary contributions of members which could be by the society legally applied for such purpose, the society came within the exemptions of the 62nd section of the *Charitable Trusts Act*, 1853, and the 48th section of the Act of 1855, and that, notwithstanding the 29th section of the Act of 1855, the society had power to sell the estate without the consent of the Commissioners. Royal Society of London and Thompson - - - 407

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CLUB—*Power of Expulsion of Member—Validity of Rule—Conduct injurious to Character and Interests of Club—Bona fides—Irregularity—Interference of Court.*] The Court will not interfere against the decision of the members of a club professing to act under their rules, unless it can be shewn either that the rules are contrary to natural justice, or that what as been done is contrary to the rules, or that there has been *mala fides* or malice in arriving at the decision.—One of the rules of a club provided that a general meeting might alter any of the standing rules affecting the general interests of the club, provided this was done with certain formalities and by a certain majority:—*Held*, that a rule providing for the expulsion of members who should be guilty of conduct injurious to the interests of the club was within the regulation, and could be validly passed by a general meeting.—One of the rules of a club provided that in case the conduct of any member should, in the opinion of the committee, be injurious to the character and interests of the club, the committee should be empowered to recommend such member to resign, and if he should not comply, the committee should then

CLUB—*continued.*
call a general meeting, and if a majority of two-thirds of the meeting agreed by ballot to the expulsion of such member, he should be expelled. —The Plaintiff, a member of the club, sent a pamphlet which reflected on the conduct of *S.*, a gentleman in a high official position, also a member of the club, to *S.*, at his official address, enclosed in an envelope on the outside of which was printed "Dishonourable Conduct of *S.*" The committee being of opinion that this action was injurious to the character and interests of the club, called upon the Plaintiff for an explanation, which he refused to give. They then called on him to resign, and as he did not comply with their recommendation, they duly summoned a general meeting, at which a resolution was passed by the requisite majority expelling the Plaintiff from the club:—*Held* (affirming the decision of *Jessel*, M.R.), that the Court would not interfere to restrain the committee from excluding the Plaintiff from the club.—The fact that a decision is unreasonable may be strong evidence of malice, but is not conclusive, and may be rebutted by evidence of *bona fides.* DAWKINS *v.* ANTROBUS [**C. A. 615**

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COMMON—"*Common Pasturage and Herbage*"—*Jus secandi vel falcandi—Common of Estovers—Prescription—Profit à prendre in alieno solo—2 & 3 Will.* 4, *c.* 71, *s.* 1.] Previous to the disafforestation and grant of *A. Forest* in 1677, the Crown was absolute owner of the soil of the forest and possessed of all the rights belonging to such ownership including vert and venison. The tenants of the adjoining manors had customary rights of common of pasture, herbage, and pannage, but the Court Rolls and other documents contained no evidence of any customary right in the commoners to cut and carry away from the forest brakes, fern, and litter, except by permission of the forest officers, and afforded negative evidence that no such right was ever claimed or lawfully exercised.—In a suit instituted in 1691, for the purpose of determining how much of the forest might properly be inclosed having regard to the rights of common, the commoners by their answers claimed rights of pasturage, and pannage for swine and, as to such of them as had houses, certain quantities of fuel wood for their houses, but made no claim in respect of any other estovers. By the decree made in 1693, after allotting to the owners for inclosure and improvement portions of the forest within which the commoners were to be excluded and debarred from any common of pasture, herbage, or pannage, the residue of the forest (containing 6400 acres) was allotted to remain open and uninclosed, "and the said defendants, their heirs, tenants, and assigns, and all other persons having right of common in the said forest according to their respective interests therein, shall from time to time have and take the sole common pasturage and herbage of all and every the lands allotted and left for common as aforesaid"—the owners, their heirs and assigns, tenants and farmers, being for ever excluded "from having or claiming any common of pasture or herbage upon or in the said lands so left for common as aforesaid."—In an action brought by the owner of the inheritance in 1878 to restrain one of the commoners from cutting and carrying away brakes, fern, and litter from the 6400 acres, for use upon the copyhold tenement in respect of which he had his right of common, the Defendant claimed this right as one of the commoners entitled to the benefit of the decree of 1693, and also alternatively by prescription in respect of his particular tenement:—*Held*, by *Bacon*, V.C., and by the Court of Appeal, 1. That upon the construction of the decree of 1693, by which the respective rights of the lord and the commoners were defined and determined, the right of the commoners over the 6400 acres was limited to common of pasturage and herbage, and did not include the right to cut and carry away the brakes, fern, heather, and litter growing therein. —2. That the existence at the date of that decree of any special custom authorizing the commoners to cut and carry away brakes, &c., and litter in that which had been a royal forest, had not been established, and was negatived by the absence of any claim to such a custom by the commoners in the suit in which that decree was made.—3. That evidence of usage subsequent to the date of the decree of 1693 could not affect the construction of that decree, which in its terms was clear and unambiguous.—*Held*, by *Bacon*, V.C., that the alternative claim to the alleged right by prescription in respect of the particular tenement being a claim of a *profit à prendre in alieno solo* could not be sustained.—*Held*, on appeal, that as the Defendant and his predecessors in title were shewn to have claimed to take, and to have actually taken, as of right and without any permission from the lord, litter from 6400 acres for the use of the tenement for upwards of sixty years immediately before the action, they had, under the *Prescription Act* (2 & 3 Will. 4, c. 71). acquired a right to do so, although they had claimed to do the acts complained of under the mistaken supposition that all the commoners were entitled to do them.—In order to establish a right under the *Prescription Act*, it is only necessary to shew that the benefit claimed has been actually enjoyed by the claimant for the requisite period as of right and not by permission, and that the right claimed is one which could have a legal origin by custom, prescription, or grant, and it is immaterial on what ground the claimant rested his alleged right to enjoy it. EARL DE LA WARR *v.* MILES - - - **C. A. 535**

COMPANY—*Directors—Authorizing Mortgage—Ultrà Vires—Limit—Capital not called up—Shares not issued.*] Among the objects of a company was to purchase ships; and the directors were empowered to do all needful acts in furtherance of the objects of the company; they were also expressly authorized to borrow, on the security of

COMPANY—*continued.*

the property of the company, any sum of money not exceeding two-thirds of the capital of the company not called up.—The directors mortgaged a ship, the only property of the company, to secure the payment of a sum of money advanced to the company, and of unpaid purchase-money of the ship; the amount so secured much exceeding two-thirds of the amount not called up of the shares actually issued, but being within two-thirds of the whole nominal capital not called up:—*Held*, that the mortgage was within the powers of the directors, and was valid; and that the term "capital not called up" included shares which had not been issued. ENGLISH CHANNEL STEAMSHIP COMPANY *v.* ROLT - - - 715

2. —— *Power to Company to purchase its own Shares—Reduction of Capital—Companies Act*, 1862, *ss.* 12, 23—*Companies Act*, 1867, *s.* 9.] The memorandum of association of a limited colliery company gave the company power to do all things which it should consider conducive to the attainment of its objects, but did not in terms give any power to purchase its own shares. The 10th clause of the articles empowered the directors to purchase for the company any shares in the company, and directed that the shares so purchased should be dealt with as if they had never been issued, and that any profit arising on the re-issuing or subsequent sale of such shares should be deemed profits of the year in which they were re-issued or sold. In 1872, disputes having arisen as to the conduct of the business, the directors agreed with *W.*, the largest shareholder, who was also one of the directors, to purchase for the company his shares and also his interest as landlord of the mines worked by the company. This arrangement was confirmed by an extraordinary general meeting of the company, and was carried into effect by an assignment of his interest in the mines to the company for a specific sum, and by a transfer to the company of his shares for another specific sum. The company was entered in the share register as holder of these shares, and in all the subsequent returns to the Registrar of Joint Stock Companies the company was entered as such holder. The company for some time was prosperous, but afterwards fell into difficulties, and in 1879 an order was made for winding it up:—*Held*, by *Jessel*, M.R., that the power to the company to purchase its own shares was illegal, and that *W.* must be placed on the list of contributories.—*Held*, on appeal, that although the articles could not effectually authorize a general trafficking in shares, as that would be extending the business of the company in a way not authorized by the memorandum, there was nothing illegal in a clause authorizing a purchase of shares, not for profit, but for carrying into effect an arrangement considered to be for the benefit of the company; that such a purchase did not reduce the capital of the company in any sense in which such reduction is prohibited by the Companies Acts; and that *W.* had effectually surrendered his shares to the company and ceased to be a shareholder from the date of the surrender, and was not a contributory:—*Held*, further, that if the transaction, supposing it to have been carried into effect without the sanction of the extraordinary general meeting, would have been questionable, the company having confirmed it and taken the benefit of it, could not now have impeached it, and that the liquidator had no better right. *In re* DRONFIELD SILKSTONE COAL COMPANY - - - - - **C. A.** 76

3. —— *Prospectus—Misrepresentation—Companies Act*, 1867, *s.* 38—*Contract—Action of Deceit—Measure of Damages.*] The prospectus of a company formed for taking over a business, after mentioning the price to be paid by the company for the business, stated that the remuneration of the directors would be fixed by the shareholders, and that it was proposed that they should be paid only by a commission on the profits made, and that no promotion money would be paid to them by the company. The vendors of the business, who became directors, received part payment in 3000 fully paid-up shares of the company, and an agreement for such part payment was disclosed in the prospectus. Shortly after the formation of the company the vendors transferred 800 of these shares (being of the nominal amount of £4000), as to 350 to the solicitors who had acted in the formation of the company, and as to the remaining 450 to the directors other than the vendors. The Plaintiff took shares on the faith of the prospectus and paid them up in full. Some time afterwards the shareholders discovered the transfer of the 800 shares and removed the directors. A claim was made on behalf of the company against the directors who had received the 450 shares, and they by way of compromise surrendered those shares to the company. The Plaintiff retained his shares, and nearly two years after the transfer to the directors had been discovered he commenced an action against the old directors and the solicitors, alleging that the Defendants other than the vendors had agreed to become promoters on the terms of receiving as remuneration £4000 in fully paid-up shares or money, out of the shares or money to be received by the vendors; that the nominal purchase-money included this promotion money of £4000 as well as the real purchase-money; that the value of the property was not so much as the nominal purchase-money, less £4000; and that the statements in the prospectus were false; and he claimed as damages the whole nominal amount of his shares, on the ground that they had become utterly worthless. It appeared in evidence that at the time when the prospectus was issued, or at least before the Plaintiff took his shares, there was an understanding between the vendors and the other directors that the other directors should receive from the vendors some remuneration, and that on the day when the Plaintiff's application was accepted the transfer of the 450 shares to the other directors was agreed to; but there was no evidence of there having been any understanding for remuneration at the time of the contract for sale to the company, and it appeared that the price agreed to be given by the company was a fair one:—*Held*, by *Fry*, J., that although the understanding that the directors should receive remuneration was not such a contract as is required to be specified in the prospectus by sect. 38 of the *Companies Act*, 1867, the concealment of the

COMPANY—*continued.*

arrangement was material misrepresentation, and made the prospectus fraudulent irrespectively of the statute; and that the Plaintiff was entitled to recover by way of damages the excess of the money paid for his shares over the real value of them at the time when he took them.—*Held*, on appeal, that the case was to be decided, not according to the principles applicable to an action to rescind the agreement by the Plaintiff to take shares, but according to the principles applicable to a common law action for deceit; that, there being no arrangement for the directors to receive any promotion money from the company, the prospectus did not contain any misstatement on which an action for deceit could be grounded; and that the action must be dismissed. ARKWRIGHT *v.* NEWBOLD - - - - - **C. A. 301**

4. —— *Rectification of Register—Change of Directors—Allotment—Shareholder's Name removed.*] An applicant for shares in a company received a letter of allotment, and at the same time a letter informing him that two of the four directors named in the prospectus had retired. The applicant on the same day wrote to the company stating that he had applied for shares entirely in consequence of these two directors being directors, and asking to have the allotment cancelled:—*Held*, that under the circumstances the applicant was entitled to have his name removed from the register of shareholders.—*Hallows* v. *Fernie* (Law Rep. 3 Ch. 467) distinguished. *In re* SCOTTISH PETROLEUM COMPANY. ANDERSON'S CASE - - - - - - 373

5. —— *Unregistered Company—Application of Part IV. of Companies Act, 1862, to Unregistered Companies—Companies Act, 1862, ss. 85, 199, 201, 204—Judgment against Company after Petition to wind up—Practice—Costs as between Defendants.*] *W.* being entitled to the money payable on a policy of insurance on the life of his wife, who had lately died, assigned it to *R.* *R.* brought an action against the insurance company, which was an unregistered company, and *W.*, to recover the money. The company paid it into Court. The Plaintiff applied by summons to have it paid out to her, and to have her costs taxed and paid by the company; and *W.* took out a summons for payment of his costs. On the 6th of August, 1880, an order was made for payment of the money to the Plaintiff, and for payment of her costs by the company; and all proceedings were stayed, except on *W.'s* summons, which was adjourned. The Plaintiff's costs were taxed and paid. In October, 1880, two petitions were presented for winding up the company. On the 3rd of December, 1880, *W.'s* summons was heard, and the Vice-Chancellor ordered the Plaintiff to pay *W.'s* costs, and ordered the company to repay the Plaintiff what he should so pay, no objection being taken by the company on the ground of the pendency of the winding-up petitions, although the claim was resisted on other grounds. The Plaintiff paid *W's* costs, and applied to the company for repayment, which was refused; and the company applied in the action to restrain the Plaintiff from issuing execution for these costs. The winding-up petitions were still pending, and no order for winding up had been made:—*Held*, by *Bacon*, V.C., that the company being unregistered, and no winding-up order having been made, sect. 85 of the *Companies Act*, 1862, did not apply; and that there was no jurisdiction to make the order.—*Held*, by the Court of Appeal, that where proceedings are pending for winding up an unregistered company, all the provisions of Part IV. of the *Companies Act*, 1862, other than those expressly excepted, are applicable; and that under sect. 85 the Court had jurisdiction to make the order asked for; the direction in sect. 204, that "an unregistered company shall not, except in the event of its being wound up, be deemed to be a company under this Act," not being intended to confine the application of the Act to a company which has been actually ordered to be wound up:—But *held*, that as the company had allowed the order of the 3rd of December, 1880, to be made without raising the objection that the pendency of the winding-up proceedings made such an order improper, and had lain by till that order could not be appealed from, the Court ought not now to exercise in their favour the discretionary power to stay proceedings which is given by sect. 85.—In cases where under the old practice in Chancery the Court would have ordered the plaintiff to pay the costs of one defendant and have them over against another defendant, an order will now be made at once for the one defendant to pay them to the other. RUDOW *v.* GREAT BRITAIN MUTUAL LIFE ASSURANCE SOCIETY - - **C. A. 600**

6. —— *Unregistered Company—Companies Act*, 1862, *s.* 20—*Intended Registration of New Company—Similarity of Name—Injunction quia timet.*] A company not registered under the *Companies Act*, 1862, can restrain the registration under that Act of a projected new company, which is intended to carry on the same business as the unregistered company and to bear a name so similar to that of the unregistered company as to be calculated to deceive the public. HENDRIKS *v.* MONTAGU - - - - - - 638

7. —— *Winding-up—Assignment by Official Liquidator of all the Property of a Company—Claims against Directors for Misfeasance—Companies Act*, 1862, *s.* 95, *sub-s.* 3.] A company being in course of winding-up, an arrangement was entered into with the sanction of the Court, in pursuance of which the official liquidators assigned to *W.*, in the most general terms, all the estate, property, and effects of the company which the liquidators had power to dispose of, in consideration of certain payments to be made by *W.*, and which were duly made. *W.* entered into the arrangement on behalf of *E.*, an officer of the company. After this the liquidators brought forward claims against *E.* and some of the directors, alleging that they had improvidently sold property of the company at an undervalue, and seeking to make them liable for the loss, and also alleging that *E.* and some of the directors had purchased for the company certain property, and concealed the fact that it had shortly before been bought by *E.* for little more than half the amount, and seeking to make them liable for the difference. The existence of these claims was not known at the time when the above arrangement was entered into. *E.* took out a summons

COMPANY—*continued.*

to restrain the liquidators from prosecuting these claims without his consent, which application was refused by *Hall*, V.C.:—*Held*, on appeal, that claims of this nature were "things in action" of the company within the meaning of the *Companies Act*, 1862, s. 95, sub-s. 3, and could be assigned by the official liquidator, that they were assigned by the deed, and that *E.* was entitled to the order which he asked, but that the order ought to be made without prejudice to any application which the liquidators might make to the Vice-Chancellor to enforce the claims, in case they should be successful in proceedings to set aside the arrangement. *In re* Park Gate Waggon Works Company - - - - - **C. A.** 234

8. —— *Winding-up — Directors' Liability — Fiduciary Relation — Company intended to be worked as a Private Partnership—Shareholders subsequently admitted.*] A company was formed and registered consisting of eight persons, seven of whom were directors and the eighth the solicitor, for the purchase and working of a patent belonging to some of the members. The directors allotted shares without consideration to some of their number. It was proved to the satisfaction of the Court that it was intended at that time to work the company as a private partnership, and to admit no other members. All the members consented to what was done, and it was sanctioned at a general meeting of the company. No prospectus was issued. Rather more than a year afterwards, the company being in need of more capital, some fresh shareholders were admitted, who alleged that they were not informed of the manner in which the original shares had been allotted. The company was ordered to be wound up:—*Held* (affirming the decision of *Jessel*, M.R.), that no fraud had been committed on the company, and that the official liquidator, as representing the company, could not call upon the directors under the 165th section of the *Companies Act*, 1862, to account for the value of the shares so allotted to them.—*Society of Practical Knowledge* v. *Abbott* (2 Beav. 559) distinguished. *In re* British Seamless Paper Box Company **C. A.** 467

9. —— *Winding-up — Distress — Commencement of Winding-up — Voluntary Winding-up — Compulsory Winding-up—Appointment of Liquidator—25 & 26 Vict. c.* 89, *ss.* 87, 163—*Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10.] After an extraordinary resolution for the voluntary winding-up of a company had been passed, but before a liquidator had been appointed, a landlord distrained for rent due from the company before the resolution was passed. Immediately afterwards an action was commenced on behalf of the debenture holders of the company, in whose favour the company had made a mortgage of its assets, and the company moved for and obtained in this action an order to restrain the landlords from proceeding with their distress. A receiver appointed in the action thereupon took possession of the chattels distrained, and by arrangement a sum of money was set apart to meet the claim of the landlords if the Court should hold them entitled to the benefit of their distress. Subsequently an order for the compulsory winding-up of the company was made which did not refer to the proceedings in the voluntary winding-up:—*Held*, by *Malins*, V.C., that the distress was good; first, because at the time when it was made there was no liquidator to interfere; and secondly, because the voluntary winding-up was superseded by the compulsory winding-up, and ordered the rent to be paid to the landlords out of the proceeds of the chattels.—*Held*, on appeal, that the distress was avoided by sect. 163 of the *Companies Act*, 1862, unless sufficient grounds could be shewn for inducing the Court to exercise the discretionary power given by sect. 87, and that the circumstances of the case did not furnish any such ground, the case not being one where the landlords could not prove for rent.—The making a compulsory order for winding up a company does not avoid *ab initio* all the proceedings under a previous resolution for voluntary winding-up.—The 10th section of the *Judicature Act*, 1875, does not import into winding-up the 34th section of the *Bankruptcy Act*, 1869, which gives a landlord priority for a year's rent. Thomas *v.* Patent Lionite Company - - - **C. A.** 250

10. —— *Winding-up — Distress — Lease of Mine—Power to distrain and stop working—Payment of full Rent.*] The owner of a coal mine leased to a company, having power to distrain for rent in arrear and to stop the working of the mine, gave notice to the liquidator requiring payment of a half-year's rent which became due after the winding-up of the company, or that the working should be stopped. The liquidator neither paid the rent nor stopped the working:—*Held*, upon summons by the lessor for leave to distrain, that the liquidator having elected to continue the working for the advantage of the company, must pay the full rent out of the first assets. *In re* Silkstone and Dodworth Coal and Iron Company - - - - 158

11. —— *Winding-up—Distress — Rent apportionable—Apportionment Act*, 1870 (33 & 34 *Vict. c.* 35.] Where a company in liquidation continued in the possession of leasehold premises for the purpose of carrying on their business:—*Held*, that the rent of the premises must be apportioned under the Act 33 & 34 Vict. c. 35, the landlord of the premises being entitled to prove jointly with the other creditors for so much rent as became due up to the date of the presentation of the petition for winding up, when a provisional liquidator was appointed, and being entitled to distrain for the full rent due after that day.—*Query*, whether there would be any such apportionment in a case where the landlord sought to proceed by re-entry instead of by distress. *In re* South Kensington Co-operative Stores 161

12. —— *Winding-up—Fire Insurance—Fires before and after Winding-up Order — Right of Proof—Companies Act*, 1862, *s.* 158—*Gen. Ord. November*, 1862, *r.* 25—*Bankruptcy Act*, 1869, *s.* 31—*Bankruptcy Rules*, 1870, *r.* 67—*Judicature Act*, 1875, *s.* 10.] The holder of a fire policy issued by a fire insurance company is entitled, upon the company being ordered to be wound up, to prove in the winding-up for the full amount of loss covered by the policy and sustained by him through a fire which has occurred in the course of the winding-up although after the date of the

COMPANY—*continued.*
winding-up order, and whether the time limited for sending in claims in the winding-up has expired or not.—*A fortiori*, a claim on account of a fire which has occurred after the presentation of the petition but before the order to wind up, is entitled to proof. *In re* Northern Counties of England Fire Insurance Company. Macfarlane's Claim - - - - - 337

13. —— *Winding-up—Leave to sue in Name of Company.*] An order was made on the application of *R.*, in a winding-up, directing that he should receive his costs of the application out of the assets. *H. & Co.* were his solicitors in this application, but had no other connection with the company or its affairs. The costs were not paid, and *R.* became bankrupt. Subsequently *Malins*, V.C., made an order, on the application of *H. & Co.*, that they should be at liberty, on giving such indemnity as the Judge should direct, to institute such proceedings as they might be advised against the former directors and promoters, to recover certain sums from them, the applicants undertaking to pay into the bank to the credit of the liquidators whatever was recovered, and also to abide by any order the Court or Judge might make as to the costs of such proceedings. *H. & Co.* thereupon commenced this action in the name of the company, against the former directors and promoters, without having taken any steps to have the indemnity fixed by the Judge. The Defendants moved that all further proceedings might be stayed, or the suit and all proceedings under it set aside, on the ground that the action had been commenced without proper authority. This application was refused by *Malins*, V.C., who expressed his opinion that the undertaking of *H. & Co.*, contained in the order, was a sufficient indemnity:—*Held*, on appeal, that as *H. & Co.* were strangers to the company, being neither creditors nor contributories, and having no charge on the assets, there was no jurisdiction to give them leave to sue in the name of the company:—*Held*, also, that if there had been jurisdiction to make such an order, the action would still have been commenced without authority, the condition precedent of *H. & Co.* giving indemnity not having been complied with:—*Held*, therefore, that the action must be dismissed, as having been instituted without authority, and that *H. & Co.* must pay the costs of all parties, including the official liquidators; the costs of the company being taxed as between solicitor and client, and the other costs as between party and party. Cape Breton Company *v.* Fenn - - C. A. 198

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CONTEMPT OF COURT—*Motion to commit—Advertisement for Subscriptions to defend a Suit—Advertisement of Reward for Evidence.*] An injunction having been granted to restrain the Defendants from infringing a patent for nickel-plating, they gave notice of appeal and published in a newspaper an advertisement inviting the trade to subscribe towards the expenses of the appeal, and also an advertisement offering a reward of £100 to any one who could produce documentary evidence that nickel plating was done before 1869. The Plaintiffs moved to commit the publishers of the newspaper for contempt of Court in publishing these advertisements, as being an interference with the course of justice, stating at the same time that they did not press for a committal, but would be satisfied with an expression of regret and an undertaking not to repeat the advertisements:—*Held*, that as all persons engaged in the trade of plating had a common interest in resisting the claims of the Plaintiffs, an advertisement asking them to contribute to the expenses of defending the proceedings was open to no objection:—*Held*, also, that the advertisement offering a reward for documentary evidence was free from objection.—*Pool* v. *Sacheverel* (1 P. Wms. 675) questioned.—The Court will discourage motions to commit where no real case for committal is made, and only an apology and costs are asked for. Plating Company *v.* Farquharson - - - C. A. 49

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COPYRIGHT—*Newspaper—Registration — Newspaper Article—Author—Injunction—Copyright Act* (*5 & 6 Vict. c.* 45).] A newspaper is within the *Copyright Act* (5 & 6 Vict. c. 45), and requires registration under that Act in order to give the proprietor the copyright in its contents and so enable him to sue in respect of a piracy.—*Cox* v. *Land and Water Journal Company* (Law Rep. 9 Eq. 324) not followed.—Also, to enable the proprietor of a newspaper to sue in respect of a piracy of any article therein, he must shew, not merely that the author of the article has been paid for his services, but that it has been composed on the terms that the copyright therein shall belong to such proprietor. Walter *v.* Howe - - - - - - - 708

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CURTESY—*Will—Devise to Married Daughter—Death of Devisee in Lifetime of Testator—Wills Act* (7 *Will.* 4 *&* 1 *Vict.* c. 26), *ss.* 3, 33—*Seisin—Husband.*] A testator died in 1875, having by his will, dated in 1872, devised a freehold estate to his daughter (the Plaintiff's wife), her heirs and assigns, for her separate use.—The daughter died in 1874, in the lifetime of the testator, leaving an only child, who was her heiress at law.—The Plaintiff claimed to be entitled for his life as tenant by the curtesy.—*Held*, upon demurrer, that the Plaintiff was entitled for his life to the property devised by the testator as tenant by the curtesy. Eager *v.* Furnivall - 115

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DISTRIBUTIONS, STATUTE OF—22 *&* 23 *Car.* 2, *c.* 10, *ss.* 6, 7—*Next of Kin—Brother's Child—Intestate domiciled in England—Child legitimated by subsequent Marriage—Foreign Law.*] The *Statute of Distributions* being a statute not for Englishmen only but for all persons, English or not, dying intestate and domiciled in *England*, and applying universally to persons of all countries, races, and religions whatsoever, the proper law for determining the "kindred" under that statute is the international law adopted by the comity of states.—Therefore a child born before wedlock, of parents who were at her birth domiciled in *Holland*, but legitimated according to the law of *Holland* by the subsequent marriage of her parents:—*Held* (by *James* and *Cotton*, L.JJ., *dissentiente Lush*, L.J.), entitled to a share in the personal estate of an intestate dying domiciled in *England* as one of her next of kin, under the *Statute of Distributions.*—*Boyes* v. *Bedale* (1 H. & M. 798) disapproved.—The decision of *Jessel*, M.R., reversed. *In re* Goodman's Trusts [C. A. 266

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—— Evidence—Entry in college books - 429
See Evidence.
—— Production of - - - 346, 675
See Practice. 9, 10.
—— Production of—Bankruptcy - - 512
See Bankruptcy. 11.

DOMICIL—Illegitimate children - - 266
See Distributions, Statute of.

DRAINAGE—Right to use - - - 246
See Metropolis Management Act.

EARNINGS—Personal labour of bankrupt
See Bankruptcy. 20. [167, 768

ENTRY IN BOOKS—College—Evidence - 429
See Evidence.

ESTOPPEL — Proceedings in bankruptcy — Amount of debt - - - 447
See BANKRUPTCY. 5.

ESTOVERS - - - - - - 535
See COMMON.

EVIDENCE — *Admissibility* — *Entry in College Books.*] It was the practice that the proceedings of the Provost and Fellows of *King's College, Cambridge*, should be entered in a book, and that the entries should be signed by the Registrar of the College, who was a notary public, and who signed the entries in that character. One or two of the entries were not so signed :—*Held*, that an unsigned entry was not admissible in evidence, notwithstanding that it was proved to be in the handwriting of the person who usually made the entries at the time when it was made. FOX *v.* BEARBLOCK - - - - - 429

—— Attestation by notary - - - 833
See PRACTICE. 7.

—— Witness—Attendance before arbitrator 787
See PRACTICE. 8.

EXAMINATION—Witness in bankruptcy 512
See BANKRUPTCY. 11.

EXCEPTION — Substantial — Assignment of all debtor's property - - - 26
See BANKRUPTCY. 1.

EXECUTION—Seizure without sale—Notice of act of bankruptcy - - - 839
See BANKRUPTCY. 10.

EXECUTORY DEVISE - - - 211
See WILL. 7.

EXPLOSIVES—Patent for protecting - 721
See PATENT. 3.

EXPULSION—Member of club - - 615
See CLUB.

FARMING STOCK—Bequest of - - 696
See WILL. 2.

FIDUCIARY RELATION—Director - 467
See COMPANY. 8.

FORCIBLE ENTRY — *Damages* — *Independent Wrong—Injury to Furniture—5 Rich.* 2, *st.* 1, *c.* 8.] Damages cannot be recovered against the rightful owner for a forcible entry on land, for the statute 5 Rich. 2, stat. 1, c. 8, only makes a forcible entry an indictable offence, and does not create any civil remedy for it. But for any independent wrong (such as an assault or an injury to furniture) committed in the course of the forcible entry, damages can be recovered, even by a person whose possession was wrongful, for the statute makes a possession obtained by force unlawful, even when it is so obtained by the rightful owner.—*Newton* v. *Harland* (1 Scott, N. R. 474), *Pollen* v. *Brewer* (7 C. B. (N.S.) 371), and *Lows* v. *Telford* (1 App. Cas. 414) considered. BEDDALL *v.* MAITLAND - - - - 174

FOREIGN LAW—Illegitimate children - 266
See DISTRIBUTIONS, STATUTE OF.

FOREIGN MANUFACTURE—User in *England*
See PATENT. 3. [721

FRAUD—Debt incurred by—Proof in bankruptcy
See BANKRUPTCY. 14. [122

FRAUD—*continued.*
—— On company - - - - - 467
See COMPANY. 8.

FRAUDULENT PREFERENCE - - 58
See BANKRUPTCY. 2.

GARNISHEE ORDER — Right to proceeds of mortgaged estate - - - 259
See JUDGMENT CREDITOR.

GENERAL ORDER, NOV. 1862, r. 25 - 337
See COMPANY. 12.

GIFT—On attaining twenty-one - - 211
See WILL. 7.

—— Voluntary—Furniture - - - 416
See VOLUNTARY CONVEYANCE.

GUARANTEE—Proof in bankruptcy - 98
See BANKRUPTCY. 15.

HERBAGE—Common of - - - 535
See COMMON.

HOTCHPOT—Advances to children - 701
See WILL. 3.

HUSBAND AND WIFE—*General Engagements of Married Woman—Separate Estate—Judgment—Existing Property—Restraint on Anticipation.*] *Held*, by *Malins*, V.C., that the general engagements of a married woman entitled to separate estate will be enforced by a Court of Equity against such separate estate as she has at the time when judgment is given, including (if her husband be then dead) estate limited to her separate use, without power of anticipation.—*Held*, on appeal, that they can be enforced only against so much of the separate estate to which she was entitled, free from any restraint on anticipation, at the time when the engagements were entered into, as remains at the time when judgment is given, and not against separate estate to which she became entitled after the time of the engagements, nor against separate estate to which she was entitled at the time of the engagements subject to a restraint on anticipation. PIKE *v.* FITZGIBBON. MARTIN *v.* FITZGIBBON **C. A. 454**

—— Legacy to wife - - - - 798
See WILL. 5.

—— Separate use—Will - - - 794
See WILL. 11.

—— Settlement - - - 361, 365, n., 778
See SETTLEMENT. 1, 2, 3.

ILLEGITIMATE CHILDREN—Subsequent marriage - - - - - 266
See DISTRIBUTIONS, STATUTE OF.

INCOME—Bankrupt—Voluntary allowance 70
See BANKRUPTCY. 3.

—— Charge on—Annuity - - - 167
See WILL. 1.

INCUMBENTS' RESIGNATION ACT, 1871 (34 & 35 *Vict. c.* 44), *s.* 10—*Retired Clerk—Pension—Debt due by retired Clerk to Incumbent—Set-off.*] By the 10th section of the *Incumbents' Resignation Act*, 1871, the pension allowed to a retiring clerk is made a charge upon the revenues of the benefice, "and shall be recoverable as a debt at

INCUMBENTS' RESIGNATION ACT, 1871—*contd.* law or in equity from the incumbent of the said benefice by the retired clerk, his executors, administrators, and assigns, . . . but shall not be transferable at law or in equity."—In an action by a retired clerk against the incumbent of the benefice for payment of the arrears of the pension that had been allowed him under the Act:—*Held*, that the incumbent could not set off against such arrears a judgment debt previously due to him from the retired clerk. Gathercole *v.* Smith - - - - - **C. A. 1**

INFANT—Maintenance—Allowance out of accumulations - - - - **807**
See Maintenance.

INJUNCTION—Copyright—Newspaper - **708**
See Copyright.

—— Metropolitan main drainage - - **246**
See Metropolis Management Act.

—— Nuisance—District Board - - **685**
See Public Health Act. 1.

—— Registration of company - - **638**
See Company. 6.

INSURANCE, FIRE—Proof in winding-up **337**
See Company. 12.

INTEREST—*Bona Vacantia—Administration by Executors—Assignment to the Crown—Claim by Next of Kin—Interest payable by the Crown.*] The trustees and executors of a will administered the estate, and upon its being decided in a suit instituted for the purpose that there was an intestacy, and no heir or next of kin being discovered, the trustees assigned the leasehold property to the Solicitor for the Treasury, to be held for the benefit of the Crown. The claimants, six years afterwards, established their claim as next of kin of the testator, and the Court declared them entitled:—*Held* (reversing the decision of *Malins*, V.C.), that the Crown was not chargeable with interest on the rents and profits received from the property while in its possession. *In re* Gosman - - - - **C. A. 771**

—— Advances to children—Hotchpot - **701**
See Will. 3.

—— Breach of trust—Accumulations—Unauthorized investment - - - **142**
See Trustee.

—— Debtor's summons - - - **191**
See Bankruptcy. 6.

—— Proof in administration - - **342**
See Administration.

—— Proof in bankruptcy - - - **334**
See Bankruptcy. 16.

INTERFERENCE OF COURT—Club—Expulsion of member - - - - **615**
See Club.

INTESTACY—Statute of Distributions—Illegitimate children - - - **266**
See Distributions, Statute of.

INVESTMENT — Unauthorized — Trustee — Interest - - - - **142**
See Trustee.

JOINT AND SEPARATE ESTATE—Bankruptcy—Interest on debts - - **334**
See Bankruptcy. 16.

JOINT TENANT—*Severance — Marriage — Covenant to settle.*] By their marriage settlement the intended husband and wife each covenanted to assign and settle any personal estate which should, during the coverture, vest in the wife or in the husband in her right. At that time the wife was entitled, as one of two joint tenants, to personal estate in expectancy on the death of a person who died during the coverture:—*Held*, that the marriage and the covenant to settle each operated to sever the joint tenancy. Baillie *v.* Treharne - - - - - **388**

JUDGMENT—Against principal - - **668**
See Principal and Surety. 3.

—— Against company after winding-up - **600**
See Company. 5.

—— Against married woman—Separate estate
See Husband and Wife. [**454**

—— Proof for judgment debt—Bankruptcy **480**
See Bankruptcy. 17.

JUDGMENT CREDITOR — *Garnishee Order — Mortgagor Debtor of Judgment Debtor—Right of Holder of Garnishee Order against Mortgaged Estate—Rules of Court*, 1875, *Order* XLV., *rr.* 2, 3—27 & 28 *Vict. c.* 112, *s.* 1.] *M.* mortgaged a leasehold to *W.*, and then to *B.* A judgment creditor of *B.* obtained a garnishee order against *M.* After this *W.* sold the property under a power of sale, and an action was brought to distribute the surplus proceeds:—*Held*, by the Court of Appeal (affirming a decision of *Bacon*, V.C.), that the judgment creditor had no claim against the surplus proceeds of sale, for that a garnishee order has not the effect of transferring the debt due from the garnishee with the benefit of the securities for it, and that to treat the garnishee order as affecting the land before execution would conflict with the provisions of 27 & 28 Vict. c. 112. Chatterton *v.* Watney - - **C. A. 259**

JURISDICTION—Against third parties—Bankruptcy - - - - **13**
See Bankruptcy. 12.

—— Committee out of—Appointment - **775**
See Lunatic. 1.

JUS SECANDI VEL FALCANDI - - **535**
See Common.

LANDLORD AND TENANT—Distress—Winding-up - - - - - **250**
See Company. 9.

LANDS CLAUSES ACT, 1845, *s.* 80—*Costs occasioned by Litigation between adverse Claimants.*] Property which was in the possession of a mortgagee was taken by the *London* School Board, and the purchase-money paid into Court pursuant to the *Lands Clauses Act*, 1845. The mortgagor's trustee in liquidation presented a petition asking for an inquiry what was due on the mortgage, for payment to the mortgagee of what should be so found due, and for payment of the residue of the purchase-money to himself:—*Held* (reversing the decision of *Fry*, J.), that the Board must pay the costs of the inquiry. *In re* Bareham **C. A. 329**

LAPSE—Appointed share - - - **151**
See Power.

—— Devise to daughter—Curtesy - **115**
See Curtesy.

LEASE—Disclaimer by trustee in bankruptcy
See BANKRUPTCY. 7, 8, 9. [532, 746, 759

—— Distress—Winding-up of company 158,
See COMPANY. 9, 10, 11. [161, 250

LEAVE OF COURT—Disclaimer by trustee in bankruptcy - - - - - 759
See BANKRUPTCY. 9.

—— Leave to use name of company - 198
See COMPANY. 13.

LEGACY—Satisfaction - - - 788
See WILL. 4.

—— To wife—Priority - - - 798
See WILL. 5.

LESSOR'S TITLE—Notice of - - 353
See VENDOR AND PURCHASER.

LETTER—Addressed to bankrupt—Redirection
See BANKRUPTCY. 13. [518

—— Promise by—Subsequent formal agreement
See SETTLEMENT. 1. [361

—— Promise by—Pending negotiations—Marriage without settlement - 365, n.
See SETTLEMENT. 2.

LIABILITY—Surety—Proof in bankruptcy 98
See BANKRUPTCY. 15.

LICENSE—Patent - - - - 423
See PATENT. 2.

LIMITATIONS, STATUTE OF—*Mortgage—Mortgagor in Possession of Part of Mortgaged Property—Mortgagee in Possession of Remainder—Right to redeem—Persons under Disability—Absence of Mortgagor beyond Seas—Statute of Limitations* (3 *&* 4 *Will.* 4, *c.* 27), *ss.* 16, 28.] The rule that prevailed prior to the *Statute of Limitations* (3 & 4 Will. 4, c. 27), that no lapse of time barred the right of a mortgagor of lands to redeem the whole provided he held possession of part (*Rakestraw* v. *Bruyer*, Select Cas. in Ch. 55; Mosely, 189) has been abolished by sect. 28 of the statute.—Accordingly, where a mortgagee had been in undisturbed possession of part of the land comprised in the mortgage for upwards of twenty years, the right of the mortgagor to redeem was held to be barred by that section, although he held possession of the remainder of the land.—Sect. 16 of the *Statute of Limitations* (3 & 4 Will. 4, c. 27), saving the rights of persons under disability, such as absence beyond seas, does not apply as between a mortgagor and mortgagee. KINSMAN *v.* ROUSE [104

2. —— *Mortgage—Mortgagee in Possession—Redemption Action—Limitation—Disabilities—Statute of Limitations* (37 *&* 38 *Vict. c.* 57), *s.* 7.] Under the *Real Property Limitation Act*, 1874, the twelve years' bar to a redemption suit from the time when the mortgagee took possession, or from the last written acknowledgment, is absolute, and not to be extended by reason of any disability of the mortgagor. FORSTER *v.* PATTERSON - - - - - - - - 132

LIQUIDATED DEMAND - - - 191
See BANKRUPTCY. 6.

LIQUIDATOR—Assignment of property by 234
See COMPANY. 7.

—— Carrying on mine—Distress - - 158
See COMPANY. 10.

LUNATIC—*Appointment of Committee out of the Jurisdiction.*] It being proposed to appoint as committee a person resident out of the jurisdiction, the Master in Lunacy reported that as the proposed committee was resident out of the jurisdiction he could not approve of him. The Court, though satisfied of the expediency of appointing him, declined to do so until the Master had certified that the proposed committee was a person whom, if resident within the jurisdiction, he should have approved. *In re* BRUÈRE **C. A.** 775

2. —— *Debenture—Lunacy Regulation Act*, 1853 (16 *&* 17 *Vict. c.* 70), *s.* 141.] A debenture bond of a limited company, according to the constitution of which debentures were transferred by deed, and the deeds of transfer upon presentation to the company were registered in the company's book of mortgages, ordered to be transferred under sect. 141 of the *Lunacy Regulation Act*, 1853. *In re* MITCHELL - - - **C. A.** 515

3. —— *Sale of Real Estate under the Partition Act—Conversion—Real and Personal Representatives—Partition Act*, 1868 (31 *&* 32 *Vict. c.* 40), *s.* 8—*Settled Estates Act* (19 *&* 20 *Vict. c.* 120), *s.* 23.] By an order made in a partition suit a share of real estate belonging to a lunatic was sold, and the proceeds paid into Court to the credit of the matter of the lunacy, but they were not carried to a real estate account.—The lunatic died intestate, and his administrator claimed the money as part of the lunatic's personal estate:—*Held*, that the money retained the character of real estate, and passed to the lunatic's heir-at-law.—The words of the 23rd section of the *Settled Estates Act* when imported into the 8th section of the *Partition Act* are not to be restricted to a sale of estates in settlement, but apply to all sales effected under the *Partition Act*.—The payment of the money into Court to the credit of the lunacy was not a payment "to a person becoming absolutely entitled" within the meaning of the 23rd section of the *Settled Estates Act*. *In re* BARKER - - - - **C. A.** 241

MAINTENANCE—*Accumulations for Twenty-one Years—Tenant for Life—Infants in Remainder—Allowance for Benefit of Infants.*] A testator left property to the value of £10,000 a year to be accumulated for twenty-one years, and directed the accumulations to be laid out in the purchase of land, to be then held in trust for Sir *H. Havelock* for life, and afterwards for his eldest son for life and his first and other sons in tail, with a similar trust for Sir *H. Havelock's* second son and his issue, with subsequent limitations over:—*Held*, that as Sir *H. Havelock* was possessed of a moderate income only, which was insufficient for the maintenance and education of his sons, to fit them for their prospective positions in life, a sum of £2700 per annum should be allowed him for the benefit of the infants. HAVELOCK *v.* HAVELOCK. *In re* ALLAN - - - - - - 807

MARRIAGE—Severance of joint tenancy 368
See JOINT TENANT.

MARRIAGE SETTLEMENT—Promise by father
See SETTLEMENT. 1. [361

MARRIED WOMAN - - - - 454
See HUSBAND AND WIFE.

MEASURE OF DAMAGES—Misrepresentation in prospectus of company - - 301
See Company. 3.

MEMBER OF CLUB—Expulsion - - 615
See Club.

METROPOLIS MANAGEMENT ACT, 1855 (18 & 19 *Vict. c.* 120), *s.* 135—*Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 61—*Metropolitan Main Drainage—Metropolitan Area, Persons outside—Right to use Drainage—Injunction.*] The *Metropolis Management Act*, 1855, vested in the Plaintiffs an open sewer, called the *Stamford Brook.*—The *Metropolis Management Amendment Act*, 1862, s. 61, enacted that no person should make or branch any sewer or drain, or make any opening into any sewer vested in the Plaintiffs, without their previous consent in writing; provided that any person might, with such consent, at his own expense, make or branch any drain into any such sewer in such manner as the Plaintiff should direct. After the passing of the Act of 1855, the Plaintiffs allowed four old cottages belonging to the Defendants, on land just outside the Metropolitan area and bounded by the *Stamford Brook*, to continue to drain through an eighteen-inch brick drain into *Stamford Brook.* They subsequently, at the request of the Defendants, who paid half the cost, covered in the brook and converted it into a main sewer. When they did this, they made a drain-eye in the newly covered-in sewer as a communication for the eighteen-inch drain.—The Defendants afterwards built other cottages on the same land, and claimed the right to use the eighteen-inch drain for the purpose of draining the new cottages through the communication into the sewer:—*Held*, 1. That as the Defendants had not proved any prescriptive right to use the eighteen-inch drain for the sewage of the new cottages, nor obtained the written consent of the Plaintiffs for that purpose under sect. 61 of the Act of 1862, they were not entitled to use the eighteen-inch drain for any other purposes than those for which they used it when the brook was covered in. 2. That, therefore, the Plaintiffs were entitled to an injunction to restrain the Defendants from permitting their additional cottages, or any buildings other than the four old cottages, to drain into the *Stamford Brook.*—*Semble*, that if the Plaintiffs had given their written consent and fixed the size of the communication under the 61st section of the Act of 1862, the Defendants could then have used the eighteen-inch drain to the full extent of its capacity for all purposes. Metropolitan Board of Works *v.* London and North Western Railway Company - C. A. 246

MINE—Lease—Distress—Winding-up of company - - - - - 158
See Company. 10.

MISFEASANCE—Director - - - 234
See Company. 7.

MISREPRESENTATION—Prospectus of company
See Company. 3. [301

MORTGAGE—*Power of Sale—Notice to Mortgagor or his Assigns.*] A mortgage contained a power of sale with a proviso that the mortgagee was not to execute the power without giving notice to the mortgagor or his assigns. The mortgagor assigned his equity of redemption by way of mortgage to a second mortgagee:—*Held*, that such second mortgagee was entitled to receive notice of the first mortgagee's intention to exercise his power of sale, and was entitled to damages from him for default in giving such notice. Hoole *v.* Smith - - - - - - 434

2. —— *Transferee—Taxation—Mortgagee—Draft Mortgage or Transfer—Copies.*] A firm of solicitors acting for a number of sets of persons (five in all) interested in moneys secured upon mortgage, on the mortgage being paid off, in their bill of costs charged the executors of the mortgagor with the cost of five copies of the draft deed of transfer, and the Taxing Master having disallowed the charge for four such copies:—*Held*, that the Taxing Master was right in allowing the costs of only one copy.—A mortgagee or transferee of a mortgage, though entitled to keep a fair copy of the draft deed for his own protection until the transaction is completed, has no right to keep copies of the mortgage deed or deed of transfer after he is paid off, but whatever copies he has are as a general rule copies paid for by the mortgagor, and to be delivered up to him when he pays off the mortgage. *In re* Wade & Thomas - - - - - - 348

—— Power of sale—Garnishee - - 259
See Judgment Creditor.

—— Stamps - - - - - 10
See Stamps.

—— Statute of Limitations - 104, 132
See Limitations, Statute of. 1, 2.

NAME AND ARMS CLAUSE - - 211
See Will. 7.

NAME OF COMPANY—Leave to use - 198
See Company. 13.

NEGLIGENCE—Solicitor - - - 437
See Solicitor. 2.

NEPHEWS AND NIECES—Will—Construction
See Will. 6. [382

NEWSPAPER—Copyright - - - 708
See Copyright.

NEXT OF KIN—Claim of interest from the Crown
See Interest. [771

NOTARY—Attestation by—Evidence - 833
See Practice. 7.

NOTICE—Act of bankruptcy - - 26
See Bankruptcy. 1.

—— Sale by mortgagee—Second mortgage 434
See Mortgage. 2.

NUISANCE—Action against District Board—Liability of successors in title - 685
See Public Health Act. 1.

ORDER—Settling wife's fund—Form of order
See Settlement. 2. [778

PARTICULARS OF OBJECTION—Patent - 137
See Patent. 1.

PARTIES—Adding Plaintiff - - 169
See Practice. 1.

PARTNERSHIP—*Dissolution by Court—Date from which Dissolution is ordered—Terms of Dissolution.*] In an action for dissolution of partnership on the ground of disputes between the partners, where there is no distinct breach of the partnership articles, the dissolution will not be made retrospective, but will be ordered from the date of the judgment.—*Besch* v. *Frolich* (1 Ph. 172) followed.—The terms of dissolution in such a case as to return of premium and other matters are within the discretion of the Judge, and his conclusions will not be interfered with by the Court of Appeal except on very sufficient grounds. LYON *v.* TWEDDELL - - - C. A. 529

PASTURAGE—Common of - - - 535
See COMMON.

PATENT—*Amended Particulars of Objection—15 & 16 Vict. c. 83, s. 41—Costs—Form of Order.*] In granting the defendant in a patent action after issue joined, and a day has been fixed for the hearing, leave to amend his particulars of objection, the Court will place the plaintiff in the same position as to discontinuing the action, or disclaiming a portion of his invention, as he would have been if the original particulars of objection had contained the new instances of prior publication proposed to be introduced by amendment; and accordingly all costs incurred by the plaintiff subsequently to the delivery of the original particulars of objection will be ordered to be paid to him by the defendant in case he elects, within a time fixed by the order, to discontinue his action.—Form of order. EDISON TELEPHONE COMPANY *v.* INDIA RUBBER COMPANY - - 137

2. —— *Principal and Agent—Account—Assignment by Principal of Part of Interest to Third Party—License to work Patent—Assignment of Part of Royalty.* When an assignment is made of a share of profits (arising, *e.g.*, from the working of a patent by licensees), the assignee is entitled to an account from the licensee, but the account must be taken once for all in the presence of all the parties interested. The licensee is not bound to account to the assignor and to each assignee of a share separately.—And the assignee who asks for an account must place himself in the position of the assignor by offering to pay to the accounting party anything which may be due to him by the assignor.—An account of profits will not be directed if it is clear that no profits have been made. BERGMANN *v.* MACMILLAN - - 423

3. —— *Protecting Explosives—Foreign Manufacture according to Patent Process—Transshipment in British Waters—Continuing User—Custom House Agency—Practice—Amendment at Hearing—Rules of Court,* 1875, *Order* XXVII., *r.* 2.] A patent having been granted in this country for making the handling of nitro-glycerine less dangerous, by causing it to be absorbed in porous unexplosive substances, a material manufactured abroad by the patent process, was imported into British waters:—*Held*, by *Bacon*, V.C., that such importation, though for the purpose only of transshipment for exportation, and not for the purpose of having the material landed and stored in this country, was a continuing user in this country of the invention, and hence an infringement.—At the trial of an action for alleged infringement of a patent by the importation into British waters of a material manufactured abroad according to the patent process, for the purpose of having it transshipped for exportation, evidence was given that the Defendants had acted as Custom House agents for the foreign manufacturing firm, in getting the goods landed and stored in this country:—Leave given to the Plaintiff, at the hearing of the trial, to amend the statement of claim by alleging this practice, and that such practice was an infringement.—*Held*, by the Court of Appeal (reversing the decision of *Bacon*, V.C.), that the acting as Custom House agents for an importing firm was not an infringement of an English patent, although the importation might have been itself an infringement. NOBEL'S EXPLOSIVES COMPANY *v.* JONES, SCOTT, & CO. - - - - C. A. 721

PAVING EXPENSES - - - 782
See PUBLIC HEALTH ACT. 2.

"PAYABLE"—Vesting - - - 835
See WILL. 12.

PENSION—Retired incumbent - - 1
See INCUMBENTS' RESIGNATION ACT.

PERSON AGGRIEVED—Appeal in bankruptcy
See BANKRUPTCY. 13. [518

PETITIONING CREDITOR — Adjudication of bankruptcy—Surety - - 44
See PRINCIPAL AND SURETY. 1.

PLEADING—Supplemental action against successors in title - - - 685
See PUBLIC HEALTH ACT. 1.

POWER—*Bequest of Legacy for Life—Residuary Gift—Exercise of Power by Will—Death of Appointee before Appointor—Next of Kin of Appointor entitled.*] Testator by his will gave a sum of money to his son *M.* upon trust to invest and to pay the income unto his daughter *A.* for her separate use for life, and after her death upon trust to pay the principal sum and interest unto such persons as *A.* should by deed or will appoint, and in default of appointment upon trust for *M.*'s own benefit. The testator bequeathed to *M.* his residuary estate, and appointed him sole executor. The money was invested by *M.* upon mortgages, and the income paid to *A.* till her death. *A.*, who was not seised or possessed of any other property, by her will gave all her money and securities for money, furniture, and all other her personal estate and effects, and property, and all her real estate, if any, unto her two sisters *H.* and *C.* in proportion, *i.e.*, one-third part of all her real and personal property and effects to *H.*, and two-thirds of all her real and personal property and effects to *C.* absolutely, and she appointed *C.* sole executrix, and charged her property and effects with the payment of her debts and funeral and testamentary expenses. *C.* died in 1868, and *A.* in 1880, and *H.* was appointed administratrix of the will:—*Held*, that the two-thirds of the moneys, subject to the payment thereout of a proportion of the debts, and funeral and testamentary expenses, belonged to the next of kin of *A.*, and not to *M.*, the residuary legatee. *In re* ICKERINGILL'S ESTATE. HINSLEY *v.* ICKERINGILL - - - 151

PRACTICE—*Adding Plaintiff—Rules of Court,* 1875, *Order* XVI., *r.* 13.] The Court cannot substitute one plaintiff for another under Rules of

PRACTICE—*continued.*

Court, 1875, Order xvi., r. 13, except by the first plaintiff's consent, and where he admits that he has commenced his action improperly; but in a proper case the Court will add a plaintiff and give him the conduct of the action. EMDEN *v.* CARTE - - - - - 169

2. —— *Appeal by a Person not named as a Party to the Action—Representative Suit—Person represented by the Plaintiff.*] In an action commenced by a bondholder on behalf of himself and all other bondholders, the Plaintiff obtained an order for a receiver. One of the bondholders represented by the Plaintiff, being dissatisfied with the order, applied for leave to appeal:—*Held*, that the order having been made in favour of the class to which the applicant belonged, and having been obtained by the Plaintiff, who represented him in the action, he could not appeal against it.—*Semble*, the proper course for the dissentient shareholder to pursue was to apply to the Court below to be made a Defendant to the action. WATSON *v.* CAVE (No. 1) - - - - **C. A.** 19

3. —— *Appeal—Withdrawal of Appeal—Revocation of Withdrawal.*] The Defendant in an action having given notice of appeal against an order, wrote to the Plaintiff saying that he proposed to withdraw his appeal, and asking for his consent to his doing so. The Plaintiff at once consented to the withdrawal. Two days afterwards the Defendant wrote to say that he was under misapprehension as to a material fact, and intended to go on with the appeal. No step was taken by either side to remove the appeal from the list of appeals, and both parties filed affidavits in support of their case:—*Held*, that the Defendant had no power to revoke his withdrawal of the appeal, and that the appeal could not be heard. WATSON *v.* CAVE (No. 2) - **C. A.** 23

4. —— *Costs by way of Penalty—Appeal for Costs.*] The Judge, at the trial of an action in which there was a claim and counter-claim, thinking both parties in the wrong, dismissed the action without costs, and also dismissed the counter-claim with costs, but ordered that if the costs of the counter-claim should not amount to half the whole costs of the action the Defendant should pay the difference to the Plaintiff:—*Held*, that the order as to costs was irregular, inasmuch as, after dismissing the action without costs, it imposed part of the costs of the action upon the Defendant by way of penalty; but that in substance the order was within the discretion of the Judge, as it amounted to dismissing the claim and counter-claim and directing the Defendant to pay half the whole costs of the action. WILLMOTT *v.* BARBER - - - **C. A.** 772

5. —— *Purchase of Land—Reinvestment of Money—Redemption of Land Tax—Costs—Private Act—Rules of Court, 1875, Order* LV.—*Discretion of Court.*] A company purchased lands under a private Act of Parliament, which provided that the company should pay the costs of reinvestment of purchase-money in "lands, tenements, and hereditaments":—*Held*, that the costs of reinvestment in the redemption of land tax must be paid by the company.—The purchase-money having amounted to £125,000, the Court did not consider six applications for reinvestment, still leaving £38,440 uninvested, to be unreasonable.—The Court has now, under the *Judicature Act*, 1875, and Order LV. of Rules of Court, 1875, a discretion as to directing payment of costs where a provision as to costs is omitted in any public or private Act. *Ex parte* HOSPITAL OF ST. KATHARINE - - - - - - - 378

6. —— *Counter-claim—Extent of Relief—Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 24, *sub-s.* 3—*Rules of Court*, 1875, *Order* XIX., *r.* 3; *Order* XX., *r.* 1.] Relief can be given on a counter-claim in respect of a cause of action accrued to the Defendant subsequently to the issue of the writ in the original action.—*Original Hartlepool Collieries Company* v. *Gibb* (5 Ch. D. 713) not followed.—*Semble*, that a counter-claim is an independent action, and not part of the original action, though for convenience the two are tried together.—*Vavasseur* v. *Krupp* (15 Ch. D. 474) questioned. BEDDALL *v.* MAITLAND 174

7. —— *Evidence—Document—Notary Public—Chancery Procedure Act*, 1852 (15 *&* 16 *Vict. c.* 86), *s.* 22.] The execution of a release was attested by a notary in a colony. There was no evidence that the attestation was for the purpose of using the deed in Court:—*Held*, nevertheless, that it was a document to be used in Court within 15 & 16 Vict. c. 86, s. 22, and that the Court would take judicial notice of the notary's seal and signature. BROOKE *v.* BROOKE - - 833

8. —— *Evidence—Witness—Action in Chancery Division—Arbitrator—Compelling Attendance of Witness—Subpœna*—3 *&* 4 *Will.* 4, *c.* 42, *s.* 40—*Judicature Act*, 1873, *ss.* 3, 16.] An order may now be made on summons in the Chancery Division, under 3 & 4 Will. 4, c. 42, s. 40, requiring the attendance of a witness before an arbitrator appointed in an action in that Division, and the order will be directed to be served as an ordinary subpœna. CLARBROUGH *v.* TOOTHILL - 787

9. —— *Order of Revivor.*] A defendant, *P.*, gave notice of appeal from a judgment, and set it down. After this he died, and his executrix obtained an order of course at the Rolls that the appeal might be carried on and prosecuted by her in like manner as it might have been carried on and prosecuted by *P.* if he had not died.—*Held*, that the order was sufficient, and that the executrix was entitled to proceed with the appeal. RANSON *v.* PATON - - - **C. A.** 767

10. —— *Production of Documents—Official Referee—Jurisdiction—Rules of Court*, 1875, *Order* XXXI., *rr.* 11, 18, 20; *Order* XXXVI., *r.* 32.] The official referees have no jurisdiction to make an order for the production of documents, the proper course being to take out a summons for the purpose in the Chambers of the Judge to whom the action is attached. DAUVILLIER *v.* MYERS - - - - - - 346

11. —— *Production of Documents—Privileged Communications.*] In an action for specific performance of a building contract to take on lease building land from the Defendants, the Defendants sought to protect from production letters which had passed between their solicitors and their surveyors:—*Held*, by *Bacon*, V.C., that the letters were privileged.—*Held*, on appeal, that the De-

PRACTICE—*continued.*
fendants must produce the letters, except such of them (if any) as the Defendants should state by affidavit to have been prepared confidentially after dispute had arisen between the Plaintiff and the Defendants, and for the purpose of obtaining information, evidence, or legal advice with reference to litigation existing or contemplated between the parties to the action. Wheeler *v.* Le Marchant [C. A. 675

12. —— *Sequestration—Non-payment of Costs —Rules of Court of April,* 1880 [*Order XLVII., r.* 2]—*Subpœna for Costs—Chambers.*] On a motion the Court gave leave in its discretion, under the Rules of Court of April, 1880, to issue a sequestration for the payment of costs.—Where such application is made in an action which is transferred for hearing only to a Judge who does not sit in Chambers, it is properly made to such Judge in Court; otherwise in Chambers. Snow *v.* Bolton - - - - - 433

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PRINCIPAL AND SURETY—*Co-Sureties — Contribution—Bankruptcy Petition—Petitioning Creditor's Debt.*] A surety is not entitled to call upon his co-surety for contribution until he has paid more than his proportion of the debt due to the principal creditor, even though the co-surety has not been required by the creditor to pay anything, provided that the co-surety has not been released by the creditor.—*Davies* v. *Humphreys* (6 M. & W. 153) followed.—*Craythorne* v. *Swinburne* (14 Ves. 160) discussed. *Ex parte* Snowdon. *In re* Snowdon - - - - C. A. 44

2. —— *Co-Sureties —Contribution — Security given by principal Debtor to one Co-Surety.*] A surety, who has obtained from the principal debtor a counter-security for the liability which he has undertaken, is bound to bring into hotchpot, for the benefit of his co-sureties, whatever he receives from that source, even though he consented to be a surety only upon the terms of having the security, and the co-sureties were, when they entered into the contract of suretyship, ignorant of his agreement for security.—The American cases *Miller* v. *Sawyer* (30 Vermont, 412) and *Hall* v. *Robinson* (8 Iredell, 56) followed. Steel *v.* Dixon - - - 825

3. —— *Judgment against Principal—Liability of Surety.*] In the absence of special agreement a judgment or an award against a principal debtor is not binding on the surety, and is not evidence against him in an action against him by the creditor, but the surety is entitled to have the liability proved as against him in the same way as against the principal debtor.—The American case *Douglass* v. *Howland* (24 Wendell, 35) followed. *Ex parte* Young. *In re* Kitchin 668

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PUBLIC HEALTH ACT—*Action in nature of Supplemental Suit—Action to enforce Judgment against Successors in Title—Nuisance — Injunction—District Board*—38 & 39 *Vict. c.* 55, *s.* 275.] A decree was made in 1875 against the corporation of *B.*, as the sanitary authority of *B.*, granting a perpetual injunction to restrain them from allowing sewage to flow into a river so as to be injurious to health or a nuisance to the Plaintiffs; but the injunction was suspended for five years, to give the corporation an opportunity to execute certain works. After the expiration of that period the Plaintiffs desired to enforce the injunction, but in the meantime the *B.*, *T.*, and *R.* District Board had been constituted under the *Public Health Act*, 1875 (38 & 39 Vict. c. 55), as the sanitary authority of the district, in the place of the corporation of *B.* —The Plaintiffs brought an action against the *B.*, *T.*, and *R.* Board, claiming a declaration that they were entitled to the same benefit of the decree as against the Defendants in the present action as if they had been Defendants in the former suit. The Defendants demurred:—*Held* (reversing the decision of *Bacon*, V.C.), that the

PUBLIC HEALTH ACT—*continued.*
B., *T.*, and *R.* Board were not made by the *Public Health Act* subject to any liabilities of their predecessors except those attaching under the Act, and were, therefore, not bound by the decree against them; and that, there being no allegation of any nuisance committed by the *B.*, *T.*, and *R.* Board, the Plaintiffs had no cause of action, and the demurrer must be allowed. Attorney-General *v.* Birmingham, Tame, and Rea Drainage Board - - - - **C. A. 685**

2. —— *Street Improvements — Expenses of Sewering and Paving—Private Improvement Expenses—Charge upon "Premises"—Leasehold Interest—Charge on Total Ownership—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 257.] The charge created by sect. 257 of the *Public Health Act*, 1875, for expenses incurred by a local authority for sewering and other works, and for the payment whereof the owner of the premises in respect of which the same are incurred is liable under that Act, is a charge upon the "premises" as defined by sect. 4: accordingly, it is a charge, not on the interest of any particular owner of the premises, but on the total ownership, that is to say, on the respective interest of every owner for the time being in proportion to the value of his interest. Corporation of Birmingham *v.* Baker [782

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RAILWAY COMPANY — *Arbitration—Reference to Railway Commissioners—Regulation of Railways Act*, 1873 (36 & 37 *Vict. c.* 48), *s.* 8—*Injunction—Prohibition.*] Two railway companies were empowered by a special Act to enter into a working agreement, but no provision was made respecting arbitration. The agreement made under this Act contained a clause providing that any difference between the companies should be determined by arbitration in accordance with the provisions of the *Railway Arbitration Act*, 1859. Differences having arisen, one of the companies called upon the Railway Commissioners to decide the differences under the 8th section of the *Regulation of Railways Act*, 1873.—The other company accordingly issued a writ for an injunction against the first company, which was amended by making the Railway Commissioners parties, and asking for a prohibition:—*Held* (reversing the decision of *Jessel*, M.R.), that the Railway Commissioners had no jurisdiction to undertake the arbitration, and a prohibition was issued accordingly.—The clause in the 8th section of the *Regulation of Railways Act*, 1873, which enables one party to apply for the arbitration of the Railway Commissioners, "where any difference between railway companies is, under the provisions of any general or special Act, required or authorized to be referred to arbitration," does not apply to all cases in which the agreement under which the difference has arisen has been made under the provisions of a general or special Act, but only to cases in which the specific difference has been required or authorized by a general or special Act to be referred to arbitration.—*Stokes Bay Railway and Pier Company* v. *London and South Western Railway Company* (2 Nev. & Mac. 143) and *Portpatrick Railway Company* v. *Caledonian Railway Company* (3 Nev. & Mac. 189) disapproved. Great Western Railway Company *v.* Waterford and Limerick Railway Company - - - - - **C. A. 493**

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—— Restraint on anticipation - - 368
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SET-OFF—*Army Agents—Banker's Lien—Value of Commission.*] *K.*, an officer in the army, mortgaged to *R.*, to secure £5000, all moneys which should be realized by sale of his commission. In December, 1877, *K.* obtained leave to retire from the army, and his commission was valued at £3000, which on the 6th of December, 1877, was paid by the Paymaster-General to *C. & Co.*, the army agents of the regiment, and was carried to the deposit account kept by *C. & Co.* with the Army Purchase Commissioners, there to remain till *K.'s* retirement was gazetted. *K.* kept an account current with *C. & Co.* as his bankers, which was overdrawn to the amount of £647. *K.'s* retirement was gazetted on the evening of the 18th of December, and as soon as *C. & Co.'s* office opened on the 19th, *R.* gave them notice of his security. *R.* having claimed payment of the £3000, *C. & Co.* claimed to retain out of it the £647:—*Held*, by *Bacon*, V.C., that *C. & Co.* received the £3000 as *K.'s* bankers, and had a banker's lien upon it for the balance due to them, and were therefore entitled to retain the £647.—*Held*, on appeal, that as soon as *K.'s* retirement was gazetted the £3000 became money had and received by *C. & Co.* for his use, and for which he could have brought an action at law; that they had a right to set off the balance due to them against this demand; that this set-off was equally available against *R.*, of whose security *C. & Co.* had no notice until after their right to set off had arisen; and that, therefore, independently of any question of bankers' lien, *C. & Co.* were entitled to retain the £647. Roxburghe *v.* Cox **C. A. 520**
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SETTLED ESTATES ACT—Sale under—Succession duty - - - - 711
See Succession Duty.

SETTLEMENT—*Marriage — Promise to settle—Subsequent Settlement — Lapse of Time.*] The father of a lady wrote to her intended husband that he and his wife had determined to settle on their daughter £2000, and that in addition she would have £2000 on her mother's death, and at least as much on her father's death. Eleven months afterwards the marriage took place; and on that occasion a formal agreement for a settlement of £2000 was executed, the latter not being in any way referred to. The mother died sixteen years and the father died twenty-five years after the marriage. The husband then claimed from the father's estate £4000 under the promises contained in the letter:—*Held*, that the letter had, under the circumstances, been superseded by the agreement for a settlement, and claim disallowed. *In re* Badcock. Kingdon *v.* Tagert - **361**

2. —— *Marriage—Promise by Letter to make a Settlement.*] Shortly before a marriage the intended husband, at the request of a friend of the lady, wrote a letter to the lady promising to settle her property, which was reversionary. At the same time negotiations as to a settlement were going on between the respective solicitors: but the marriage took place without any settlement being executed:—*Held*, that this was a valid agreement for a settlement; and a settlement in the usual form was ordered to be executed. Viret *v.* Viret - - - - **365, n.**

3. —— *Settlement by Court — Husband and Wife—Settlement, Order for—Joint Power of Appointment among Children—Form of Settlement—Stamp.*] In settling a fund in pursuance of a will by which the fund was bequeathed to a man until marriage and then to be settled on his wife and children, the Court inserted a power for the husband and wife jointly by deed, and for the survivor by deed or will, to appoint among the children.—Observations on *Oliver* v. *Oliver* (10 Ch. D. 765).—Form of judgment settling a fund.—An order of the Court making a settlement should bear the usual settlement stamp. *In re* Gowan. Gowan *v.* Gowan - - - - **778**
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See Will. 11.

SOLICITOR—*Bill of Costs—Taxation—Party and Party—Attorneys and Solicitors Act (6 & 7 Vict. c.* 73), *s.* 38.] A creditor's petition to wind up a company having been withdrawn on payment of the debt, the solicitors for the company undertook by letter with the petitioning creditor's solicitors "to pay all proper costs and charges incidental to and recoverable under such petition, such costs, in case of difference, to be taxed."—The amount of the costs not being agreed upon, the company obtained, *ex parte*, an order to tax under the third party clause (sect. 38) of the *Attorneys and Solicitors Act*, and served it on the solicitors of the petitioning creditors;—*Held*, on motion to discharge the order, that the undertaking was a personal undertaking to pay the costs, such costs being costs as between party and party; that the 38th section of the Act had reference only to the taxation of costs as between solicitor and client; that the order, therefore, was irregular, and must be discharged with costs to be paid by the company.—*Re Hartley* (30 Beav. 620) considered and explained. *In re* Grundy, Kershaw, & Co. - - - - - 108

2. —— *Trustee—Notice of Settlement—Sales.*] A settlement of land in *Wales*, the property of the husband, was executed shortly after a marriage, which took place in *India*. The husband and wife went to reside in *Wales*, and the husband employed a solicitor there to make his will and to sell part of the land, the solicitor concluding from the statement of the husband that there had not been any marriage settlement. The husband died leaving his widow trustee and executrix, and directing his debts to be paid out of his estate. The widow employed the same solicitor to sell other part of the land, and the solicitor received the purchase-moneys and applied them in payment of the debts of the husband. The deed of settlement had been in the possession of the wife, but had been by her given to the husband. There was no evidence as to what had become of it, but after the sales had been made a copy was found. The solicitor had concluded from what he was told by the husband that there had been no settlement, and though, before all the sales were completed, his clerk had been told by the wife that there had been a settlement, the solicitor continued to believe that there had been none.—An action was brought by the children of the marriage, entitled under the settlement, claiming to recover from the solicitor the money which had so passed through his hands:—*Held*, that under the circumstances, although the solicitor might have been negligent in that character, he could not be held to have had such notice of the settlement as to be treated as constructively a trustee, and therefore liable for the money which had passed through his hands.—Notice to raise a constructive trust is different from notice to an actual trustee.—*Cothay* v. *Sydenham* (2 Bro. C. C. 391) discussed. Williams *v.* Williams - 437

STAMPS—*Stamp Act,* 1870—*Vendor and Purchaser—Mortgage Deed—Ad valorem Stamp.*] A ten shilling deed stamp on a mortgage deed is insufficient; therefore a purchaser is entitled, on a contract for sale with a mortgagor, to require the mortgage deed, where so stamped, to be stamped before completion to the full *ad valorem* duty at the vendor's expense, notwithstanding that the mortgagee may have consented to join in conveyance. Whiting to Loomes C. A. 10

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SUCCESSION DUTY—*Settled Estates Act*, 1877 (40 & 41 *Vict. c.* 18), s. 22—*Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), ss. 39, 41, 42—*Vendor and Purchaser Act*, 1874 (37 & 38 *Vict. c.* 78).] The effect of a sale by the Court under the powers conferred by the *Settled Estates Act*, 1877, of any settled estates, is, by the operation of the 22nd section of that Act, to revoke the uses of the settlement; and by the operation of the 42nd section of the *Succession Duty Act*, 1853, the duty is shifted from the land sold to the purchase-money or its investments, and the land in the hands of the purchaser is freed from the succession duty. *In re* Warner's Settled Estates. Warner to Steel - - - - 711

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See Voluntary Conveyance.

TRUSTEE — *Breach of Trust* — *Accumulation Clause—Compound Interest—Rate of Interest.*] The trustee of a will held a fund upon trust (after the determination of a previous life interest) to transfer and pay the same to a child when and as he should attain twenty-one, with a proviso that in case the child should be under age at the determination of the life interest the income of the fund or any part thereof should or might be applied for or towards his maintenance, education, and advancement, and the surplus, if any, should accumulate to and become part of the fund.—After the child attained twenty-one (the life interest having previously determined), the trustee retained the fund without making any arrangement with the child or explaining to him his rights:—*Held*, that the trustee must be taken

TRUSTEE—*continued.*
to have continued to hold the fund after the child attained twenty-one upon the same trusts and with the same obligations to accumulate as before, and that he was liable to account for the fund with compound interest.—*Wilson* v. *Peake* (3 Jur. (N.S.) 155) distinguished.—*Amiss* v. *Hall* (3 Jur. (N.S.) 584) observed upon.—Part of the fund had been invested at 5 per cent. or other rates of interest upon authorized securities, and the rest of it had been either improperly invested or had not been kept separate from the trustee's own moneys:—*Held*, that as to so much of the fund as had been invested at 5 per cent. or any other rate upon authorized securities interest must be calculated at the rate actually yielded; that the rest of the fund must be treated as having been in the trustee's hands uninvested, and that under the circumstances he must be charged with interest thereon calculated at 4 per cent. only. *In re* Emmet's Estate. Emmet *v.* Emmet 142

TRUSTEE IN BANKRUPTCY—Disclaimer 532,
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UNREGISTERED COMPANY—Action against—Petition for winding-up - - 600
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—— Registration of company with similar name
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USER—Continuing—Violation of patent - 721
See Patent. 3.

VENDOR AND PURCHASER—*Lessor—Lessee—Restrictive Covenant—Constructive Notice—Lessor's Title—Vendor and Purchaser Act*, 1874 (37 & 38 *Vict. c.* 78), *s.* 2, *sub-s.* 1.] A purchaser or lessee having notice of a deed forming part of the chain of title of his vendor or lessor, has constructive notice of the contents of such deed, and is not protected from the consequences of not looking at the deed, even by the most express representation on the part of the vendor or lessor that it contains no restrictive covenants, nor anything in any way affecting the title.—The rule that a lessee has constructive notice of his lessor's title has not been altered by sect. 2, sub-sect. 1, of the *Vendor and Purchaser Act*, 1874, but a lessee is now in the same position with regard to notice as if he had, before the Act, stipulated not to inquire into his lessor's title.—*Wilson* v. *Hart* (Law Rep. 1 Ch. 463) observed upon. Patman *v.* Harland - - - - - 353

—— Mortgage deed—Stamp - - 10
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VESTING—Will—Construction - - 835
See Will. 12.

VOLUNTARY ALLOWANCE—Bankrupt - 122
See Bankruptcy. 14.

VOLUNTARY CONVEYANCE—*Gift of Furniture and Articles to Wife by Letters—No Declaration of Trust—Subsequent Will of Husband—Wife not entitled to the Gift.*] A husband, by three letters written and signed by him and handed to his wife, gave her furniture and other articles for her sole and absolute use. He afterwards made his will, bequeathing certain legacies and making other dispositions of his property, and giving the residue of it to trustees in trust for his wife for life with remainder to six nieces absolutely. The furniture and other articles were at the time of the husband's death in the house which had been occupied by him and his wife, and the whole had been used by them in the ordinary way:—*Held*, that the furniture, &c., formed part of the husband's estate.—*Baddeley* v. *Baddeley* (9 Ch. D. 113) and *Fox* v. *Hawks* (13 Ch. D. 822) observed upon, and *Milroy* v. *Lord* (4 D. F. & J. 264) followed. *In re* Breton's Estate. Breton *v.* Woollven - - - - - 416

VOLUNTARY WINDING-UP—Distress - 250
See Company. 9.

WATERCOURSE—*Prescription—Unity of Possession.*] By deed in 1791 *A.* obtained a demise from *B.* of an underground goit or drain to be then constructed in *B.'s* land for the purpose of conducting water from *A.'s* mill so long as an annual rent of £2 2*s.* should be paid by *A.* to *B.*—In 1836 the demise of 1791 was put an end to, and liberty was given to *A.*, who was at that time yearly tenant from *B.* of the land through which the goit ran, to change the goit or drain of 1791, and to substitute a new cut for conducting pure and clean water at the like rent of £2 2*s.*—The new cut was made and used for pure water, and the old goit (as the Plaintiff alleged) continued to be used for foul water.—In 1866 the land through which the goits ran was sold to *C.*, and in 1867 *A.'s* yearly tenancy of the land was determined.—In an action by *A.* in 1879 to restrain *C.* from interfering with his use of the old goit, to which he claimed title by prescription from alleged open and uninterrupted use and enjoyment thereof from 1836:—*Held*, that until 1867 *A.* could not acquire an easement in the land of which he was yearly tenant, distinct from the use and enjoyment of such land, as against *B.* his landlord, and accordingly that, assuming the open and uninterrupted user from 1836 to have been proved, he had failed to establish any title by prescription as against *C.* Outram *v.* Maude - - - - - - 391

WILL—*Annuity—Charge on Income or Corpus—Continuing Charge.*] A testator directed his trustees to pay an annuity out of the rents and

WILL—*continued.*

rofits of a trust estate by half-yearly payments, nd he bequeathed the remainder of such rents nd income in trust for his sister for life, with emainder to her children:—*Held*, that the annuity was a continuing charge on the rents and rofits.—*Stelfox* v. *Sugden* (Joh. 234) considered. WORMALD *v.* MUZEEN - - - 167

2. —— "*Farming Stock*"—*Growing Crops.*] A testatrix, after devising all her real estate to A., gave all the "farming stock, goods, chattels nd effects in and about" one of her farms formng part of her real estate, to *B.*: and she gave he residue of her personal estate to other perons:—*Held*, that all crops growing on the farm t the testatrix's death passed to *B.*—*Vaisey* v. *Reynolds* (5 Russ. 12) disapproved of. *In re* ROOSE. EVANS *v.* WILLIAMSON - - 696

3. —— *Hotchpot—Gift of Residue to Widow or Life, with Remainder to Children—Advances—nterest.*] A testator gave his residuary estate to is widow for life, with remainder to his children qually, with a proviso, in the common form, for ringing into hotchpot all sums advanced to any f them by him during his lifetime. The testa- r made advances to some of his children. In istributing the residuary estate among the chil- ren after the death of the widow:—*Held*, that e advanced children must bring their advances to hotchpot, with interest at 4 per cent. per nnum up to the distribution of the estate; such terest to be computed from the death of the idow, and not from the dates of the respective vances or from the death of the testator. *In re* EES. REES *v.* GEORGE - - - 701

4. —— *Legacy—Substitution—Issue of Child ad when the Will was made.*] A testatrix by er will gave a sum of money to trustees on trust, ter the death of the widow of a cousin, for the ildren of the cousin, share and share alike; ovided that in case of any of the children ring in the lifetime of the testatrix leaving sue, such issue should take the share to which eir parent would have been entitled if living.— e of the children was dead when the will was ade, and a codicil shewed that the testatrix was are of this:—*Held*, that the issue of that child ok a share in the money.—*In re Potter's Trust* aw Rep. 8 Eq. 52) followed. *In re* LUCAS'S ILL - - - - - - 788

5. —— *Legacy to Wife—Priority.*] A testa- gave to his wife all his furniture and effects gether with the sum of £500 to be paid to her mediately after his decease.—He also directed trustees to raise out of his estate the sums of 2,000 and £5000, and invest the same and pay interest of the £12,000 to his wife during her , and the interest of the £5000 to his brother sisters during their lives, and after the death his wife, brother, and sisters, those sums were fall into the residue of his estate. He then e his brother and sisters legacies of £6000 £2000, and gave other smaller legacies.— s estate proved insufficient for the payment in l of all the legacies:—*Held*, that the legacy of 0 to the wife had priority over all the other uniary legacies:—*Held*, that the legacies of 2,000 and £5000 had priority over the other

WILL—*continued.*

legacies.—*Blower* v. *Morret* (2 Ves. Sen. 420) dissented from. *In re* HARDY. WELLS *v.* BORWICK [798

6. —— *Nephews and Nieces—Consanguinity or Affinity.*] A testator devised freehold property to be divided between the children of his sister-in-law and *A.* and *B.*, and "my niece *M.*" (the last-named three devisees being nieces of his deceased wife). He gave other real property to trustees upon trust for sale, and to pay the income of the proceeds of sale amongst "all my nephews and nieces," for their lives and the life of the survivors of them, and bequeathed the capital to the survivor, and he gave other real property unto "all my said nephews and nieces" as tenants in common, and he gave his residuary realty upon trust to pay the income to "all my said nephews and nieces" for their lives and the life of the survivor, and then devised such residue to the survivor, and bequeathed his residuary personal estate equally amongst "all my nephews and nieces":—*Held*, that the circumstance of the testator having given property to his wife's nieces, and even having called one of them his niece, was not sufficient to include any of his wife's nephews and nieces in the subsequent gifts to all his nephews and nieces; and those only who were related by consanguinity were entitled to take.—*Grant* v. *Grant* (Law Rep. 5 C. P. 380, 727) dissented from. MERRILL *v.* MORTON - - 382

7. —— *Perpetuity — Contingent Remainder—Executory Devise—Life Estate—Equitable Estate—Attaining Twenty-five—Name and Arms—Possession.*] A testator devised and bequeathed real and personal estate to trustees upon trust to pay the income to his wife during her life, and after her decease, if *H.* was then living, to retain the rents of the realty to their own use during his life, and to pay him the income of the personalty during his life, and after his death upon trust to convey and transfer the real and personal estate to such son of *M.* as should first attain the age of twenty-five years, upon condition that such son of *M.* as should become entitled to any property under the will should, within two years after he should so become entitled, take the name and arms of the testator. At the testator's decease *M.* was living and had no son who had attained twenty-five, but his eldest son attained that age during the lives of the widow and *H.* This son died in the lifetime of *H.* without having taken the name and arms of the testator:—*Held*, by *Malins*, V.C., that although the limitation of the personal estate to the first son of *M.* who should attain the age of twenty-five was void for remoteness, the direction to convey the real estate to him gave him a contingent remainder which was not void for remoteness, although his estate was only equitable, the doctrine of contingent remainders being applicable to equitable as well as to legal estates; that he was not bound to take the name and arms of the testator until his estate came into possession, and that the real estate devolved upon his heir.—*Held*, on appeal, that the limitation to such son of *M.* as should first attain the age of twenty-five years could not, as in *Riley* v. *Garnett* (3 De G. & Sm. 629), be treated as intended to give an immediately vested interest

WILL—*continued.*

liable to be divested on death under twenty-five, but was a limitation contingent on the son's attaining the age of twenty-five years :—*Held*, also, that when the legal estate in fee is vested in trustees under the instrument which creates the beneficial limitations, the feudal rule by which a contingent remainder fails if it does not vest before the determination of the particular estate does not apply, and that the limitation to such son of *M.* as should attain twenty-five years, assuming it to have been an equitable remainder, would still have been void for remoteness :—*Held*, also, that the direction to the trustees to convey on the death of *H.* did not create a contingent equitable remainder, but was an executory devise. Abbiss *v.* Burney. *In re* Finch - - - - C. A. 211

8. —— *Perpetuity — Daughters' Shares — Restraint on Alienation—Rule against Perpetuities.*] A testator gave his property to trustees to pay the income to two persons for life, and after the death of the survivor to divide the capital between the children of *A. B.* and *C. D.*, two females, the shares of sons to be paid on their attaining twenty-one, and the shares of daughters to be invested and the interest paid to such daughters for life for their separate use without power of anticipation, and on their deaths the capital to go as the daughters should by will appoint. *A. B.* was dead at the date of the will, and *C. D.* was sixty years of age, and therefore past child-bearing :—*Held*, that if the children of *A. B.* and *C. D.* had not necessarily been lives *in esse* at the date of the will, the restraint on anticipation in respect of the daughters' shares would have been bad, as infringing the rule against perpetuities; but as *A. B.* was dead and *C. D.* past child-bearing, all the children were lives *in esse*, and the restraint on alienation was valid. Cooper *v.* Laroche 368

9. —— *Residuary Gift—Bequest of "all the rest of my Money however invested."*] A testatrix, by her will, after giving a pecuniary legacy and bequeathing furniture, leaseholds, and dock shares, gave "all the rest of her money however invested" to her nephew *R. J. F.* "under deduction of £50 to be paid to each of her executors." She then gave a number of specified articles, such as ornaments, plate, pictures, and house linen, to various other nephews and nieces, and appointed executors :—*Held*, that the gift to *R. J. F.* was a general residuary gift, and included the furniture, leaseholds, and dock shares, the bequest of which had lapsed. *In re* Pringle. Walker *v.* Stewart [819

10. —— "*Second Cousins.*"] A testator gave one-third of his property to his first cousins and two-thirds to his second cousins. At his death he left first cousins, second cousins, and children and grandchildren of first cousins :—*Held* (affirming the decision of the Master of the Rolls), that the term "second cousins" did not include children or grandchildren of first cousins. *In re* Parker. Bentham *v.* Wilson - - - C. A. 262

11. —— *Separate Estate—"Sole use and disposal."*] A legacy given to a married woman for her "sole use and disposal" vests in her as separate estate. Bland *v.* Dawes - - 794

12. —— *Vesting—"Payable."*] A testator, by his will, bequeathed an annuity to his daughter, and directed that after her death the trustees should hold £2000, part of the fund set apart to secure the annuity, upon trust to pay and divide the same unto and equally between the child and children of the daughter as and when they should respectively attain twenty-one, and, in case any of the children should die before their shares should become "payable as aforesaid" without leaving issue, the share or shares of him, her, or them so dying should be paid to the survivor or survivors of them, equally if more than one, and, if but one, the whole to that one, with power for the trustees, during the respective minorities of the children, to apply the income of his, her, or their expectant share or shares towards his, her, or their maintenance and education. And if all such children should die under twenty-one, without leaving issue, the fund was given over :—*Held*, that the children's shares absolutely vested at twenty-one, and were not divested by subsequent death without issue in the lifetime of their mother. Partridge *v.* Baylis - - - - 835

—— Appointment by—Death of appointee 151
See Power.

WINDING-UP—Company.
See Cases under Company.

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See Will. 12.

—— "Sole use and disposal" - - 794
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